SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, W. E. NICKEY, MRS. ORPHA L. NICKEY, ET AL., APPELLANTS,

vs.

THE STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN CHANCERY COURT OF TUNICA COUNTY, SEPTEMBER RULES 1929

STATE OF MISSISSIPPI ex Rel. RUSH H. KNOX, Attorney General,

vs.

A. B. NICKEY & SONS

BILL OF COMPLAINT—Filed July 23, 1929

To the Honorable Chancery Court of Tunica County, Mississippi:

Now comes Rush H. Knox and respectfully shows to the court that he is the duly elected, qualified and acting Attorney General of and for the State of Mississippi, and complains of A. B. Nickey & Sons, a co-partnership composed of A. B. Nickey, S. M. Nickey, W. E. Nickey and Mrs. O. L. Nickey, operating and doing business under the name of A. B. Nickey & Sons.

Complainant further shows to the court that each of the above named defendants are non-residents of the State of Mississippi, all of said defendants being, as he is informed and believes, residents of the City of Memphis, Shelby County, Tennessee, but that the street addresses of said defendants are unknown to complainant and he has been unable to ascertain same after diligent search and inquiry.

Complainant further shows to the court that the said A. B. Nickey & Sons are the owners of large tracts of land in Tunica County, Mississippi, and were the owners of said lands on the first day of February, 1928, said lands being described as follows:

NE¼ and NE¼ of NW¼ and S½ of NW¼ and S½ of Section 2, Township 4, Range 10, and a 3 acre strip in said section; all of that part of Section 23, Township 4, Range 10 lying North of Coldwater River, and that part of the NW¼ of Section 24, Township 4, Range 10 lying north of Coldwater River, and the W½ of Section 12, [fol. 2] Township 4, Range 10, and the W½ of Section 13, and all of Section 14, Township 4, Range 10, all in Tunica County, Mississippi.

Complainant further shows to the court that all of said lands were duly and legally assessed to the said A. B. Nickey & Sons for the year 1928, and reference is hereto made to the tax rolls of said county, which original rolls will be produced at the hearing of this case.

Complainant further shows to the court that all of said lands are within the Yazoo-Mississippi Delta Levee District and Brunswick Extension, and are also within the Lake Cormorant Drainage District in said County.

Complainant further shows to the court that none of the taxes levied against any of said lands have been paid for the year 1928, although same are now long past due, and that neither the Yazoo-Mississippi Delta Levee ad valorem or the Brunswick Extension or the Yazoo-Mississippi Delta Levee Acreage taxes have been paid for said year, and that the Lake Cormorant drainage District taxes, although long delinquent, have not been paid for the year 1928, and that the state and county ad valorem taxes of the various subdivisions of said County have not been paid, but that all of said taxes are long since delinquent and that said lands have been advertised for sale, as required by law, by T. E. Salmon, Sheriff and Tax Collector of Tunica County, Mississippi.

Complainant respectfully shows to the court that there is now due from A. B. Nickey & Sons for taxes due the State of Mississippi, County of Tunica, the Yazoo-Mississippi Delta Levee District and Lake Cormorant Drainage District and the various taxing districts in said county, together with costs, damages, etc., the sum of $7,483.22, as shown by statement hereto attached marked Exhibit "A" and made a part of this petition; said exhibit showing in [fol. 3] detail how the taxes are distributed according to the rolls of said county.

Complainant respectfully shows to the court that all of said lands are chiefly valuable on account of the timber growing thereon, and that the taxes now due are the taxes that were assessed against said lands as timber lands, and complainant is informed and believes that the land exclusive of the timber is not of a value sufficient to pay the taxes now past due on said lands.

Complainant respectfully shows to the court that he is informed and believes that the said defendants are now engaged in removing the timber from said lands, and that

unless they are enjoined and restrained from so doing that all of said timber will be removed from said lands and the state, county and subdivisions thereof will be deprived of taxes justly due and owing by said defendants.

Complainants is informed and believes that it is the custom of said defendants to remove the timber from the lands owned by them and then permit same lands to be sold for taxes, and that in De Soto County, Mississippi said defendants, as complainant is informed and believes, recently permitted approximately 1,000 acres of land owned by them to be sold to the State of Mississippi for taxes, and that said lands are not now worth the amount of taxes assessed against them, and complainant is informed and believes that it is the intention of said defendants to remove at the earliest possible date the timber from all of the land owned by them in Tunica County, Mississippi and permit said land to be sold to the State of Mississippi for taxes and that before the time of redemption has expired and before the title vests in the State of Mississippi all of said timber [fol. 4] will have been removed from said lands, and the state, county, levee and drainage districts will be deprived of taxes now due and legally assessed against said lands.

Complainant is informed and believes that said taxes are a debt due by said defendants to the State, county, levee and drainage districts, and that said taxes are recoverable by suit at the instance of the Attorney General.

Complainant further shows that said defendants are also the owners of the following described lands in Tunica County, Mississippi, towit: All of Section 1; the SW¼ of the NE¼ of Section 3, the NW¼ of the SE¼ of Section 3, except railroad right-of-way; the N½ of the NE¼ of Section 3; the SE¼ of the NE¼ of Section 3; the NE¼ of the SE¼ of Section 3; the S½ of the SE¼ of Section 3; the NE¼ of Section 10; the E½ of the SE¼ of Section 10; all of Section 11; the NE¼ of the NE¼ of Section 15; the S½ of the NE¼ Section 15; the SE¼ of Section 15; all in Township 4, of Range 10 West.

Complainant further shows to the Court that the defendants are now engaged in cutting and removing the timber from said lands described in the preceding paragraph and that if permitted to cut and remove said timber the remaining property of defendants in the state of Mississippi will not be sufficient to satisfy the debts due

from said defendants, and that the state, county, levee and drainage district will suffer irreparable injury and loss and that they have no just, adequate and complete remedy at law for the collection of said taxes after the timber on said lands have been removed therefrom.

Complainant further shows to the court that said defendants, and each of them, are non residents of this state; [fol. 5] that they, and each of them, are in default for public money due from them and each of them as principals to the state, county, Yazoo-Mississippi Delta Levee District and the Lake Cormorant Drainage District.

Therefore, the prayer of the petitioner is that all proper process of this court issue, making each of the above named parties defendants hereto, returnable to the September Rules 1929 of this court, and that they and each of them be required to plead, answer or demur to this bill, answer under oath being waived, and that upon a final hearing, that complainant be awarded a decree against said defendants and each of them for the total amount of taxes due, together with interest, damages and costs, as provided by law.

Complainant further prays that an injunction issue from this Honorable Court restraining the above named defendants and each of them, their agents and employees, from cutting or removing any timber from any of the lands described herein both the lands referred to on page one hereof and the lands referred to on page 3 hereof, until all taxes due by said defendants and each of them to the State of Mississippi, the County of Tunica, the Yazoo-Mississippi Delta Levee District and the Lake Cormorant Drainage District have been paid in full, together with damages and costs, as required by law, and that upon a final hearing of said cause they be perpetually enjoined and restrained from removing and disposing of any of the timber on any of the above described lands until said taxes, damages and costs have been paid, and that a decree be entered against said defendants jointly and severally in the sum of $7,483.22, together with all costs herein expended.

[fol. 6] Complainants further prays that a writ of attachment issue by this Honorable Court and that all of the property owned by said defendants, or any of them, or a sufficient amount thereof, be seized and held to wait the

final disposition of this case, to satisfy such decree or judgment as will be rendered herein, and for such other further and more general relief as to the court may seem just and proper; and if complainant has not prayed for the proper relief, he prays the court to enter such decree and grant such relief as to the Court may seem just and proper, and in duty bound your petitioner will ever pray, etc.

Rush H. Knox, Attorney General.

Duly sworn to by Rush H. Knox. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 7] EXHIBIT "A" TO BILL OF COMPLAINT

Sale of Lands for Taxes

STATE OF MISSISSIPPI,
County of Tunica:

I, T. E. Salmon, Sheriff and Tax Collector of the County of Tunica, in said State will sell on the First Monday of April, A. D. 1929, at the west front door of the Courthouse of said County, in the Town of Tunica, of the County of Tunica, Mississippi, to the highest bidder or bidders for cash, if any there be, all of the following described lands situated in the County of Tunica on which the following taxes remain unpaid at that date to-wit:

A. B. Nickey & Sons: NE¼ and NE¼ of NW¼ and S½ of the NW¼ and S½, 3 A. Strip, Section 2, Township 4 Range 10, 603 acres; State Tax $50.11; General County Tax $73.60; Highway Road Bond Interest $4.70; Y. M. D. Levee Advalorum and Brunswick Extension $37.02; Y. M. D. Levee Acreage $12.06; Beat No. 2 Advalorum Road $59.51; Lake Cormorant Drainage District $1322.69; Printer fee $.40 Clerks fee $.60; Sheriffs fee $1.25; Damages $155.97, Total $1717.91.

A. B. Nickey & Sons: All Frac. N. of C. W. River, Section 23, Township 4, Range 10, 606 acres; State Tax 228.78; General County Tax $33.60 Highway Road Bond

Interest $21.45; Y. M. D. Levee Advalorum and Brunswick Extension $169.01; Y. M. D. Levee Acreage $12.12; Beat No. 2 Advalorum Road $271.67; Lake Cormorant Drainage District $596.06; printers fee $.40 clerks fee $.60; Sheriffs Fee $1.25; Damages $163.51, Total $1800.86.

[fol. 8] A. B. Nickey & Sons: NW½ N of C. W. River, Section 24, Township 4, Range 10, 122 acres; State Tax $47.66 General County Tax $70.01; Highway Road Bond Interest $4.47; Y. M. D. Levee Advalorum and Brunswick Extension $35.21; Y. M. D. Levee Acreage $2.44; Beat No. 2 Advalorum Road $56.60; Lake Cormorant Drainage District $77.77; Printer's Fee $.40; Clerks Fee $.60 Sheriff's Fee $1.25; Damages $29.42; Total $325.83.

A. B. Nickey & Sons: W½, Section 12, Township 4 Range 10, 320 acres; State Tax $54.59; General County Tax $80.18; Highway Road Bond interest $5.12; Y. M. D. Levee Advalorum and Brunswick Extension $40.33; Y. M. D. Levee Acreage $6.40; Beat No. 2 Advalorum $64.83; Lake Cormorant Drainage District $612.00; Printer's Fee $.40; Clerk's Fee $.60; Sheriff's fee $1.25; Damages $86.35; Total $952.05.

A. B. Nickey & Sons: W½, Section 13, Township 4 Range 10, 321 acres; State Tax $73.86; General County Tax $108.48; Highway Road Bond Interest $6.92; Y. M. D. Levee Advalorum and Brunswick Extension $54.56; Y. M. D. Levee Acreage $6.42; Beat No. 2 Advalorum Road $87.71; Lake Cormorant Drainage District $306.00; Printer's fee $.40; Clerk's Fee $.60; Sheriff's Fee $1.25; Damages $64.40; Total $710.60.

A. B. Nickey & Sons: All of Section 14, Township 4 Range 10, 641 acres; State Tax $191.81; General County [fol. 9] Tax $281.72; Highway Road Bond Interest $17.98; Y. M. D. Levee Advalorum and Brunswick Extension $141.70; Y. M. D. Levee Acreage $12.82; Beat No. 2 Advalorum Road $227.78; Lake Cormorant Drainage District $920.48; Printer's fee $.40; Clerk's Fee $.60; Sheriff Fee $1.25; Damages $179.43; Total $1,975.97.

Grand Total: State Tax $646.81; General County Tax $950.00; Highway Road Bond Interest $60.64; Y. M. D. Levee Advalorum and Brunswick Extension $477.83; Beat No. 2 Advalorum Road $768.10; Y. M. D. Levee Acreage $52.26; Lake Cormorant Drainage District $3,835.00;

Printer's Fee $2.40; Clerk's Fee $3.60; Sheriff's Fee $7.50; Damages $679.08, Great Grant Total $7,483.22.

T. E. Salmon, Sheriff & Tax Collector, by H. C. Webb, D. S.

[File endorsement omitted.]

[fol. 10] IN CHANCERY COURT OF TUNICA COUNTY

WRIT OF ATTACHMENT AGAINST DEBTOR—Returned and Filed July 24, 1929

The State of Mississippi to the Sheriff or any Constable of Tunica County, Greeting:

Whereas, State of Mississippi, ex Rel. Rush H. Knox, Attorney-General, hath complained on oath to the Chancery Court of the County of Tunica in said State, by Bill of Complaint, which has been duly filed, that A. B. Nickey, S. N. Nickey, W. E. Nickey and O. L. Nickey, a co-partnership operating and doing business as A. B. Nickey & Sons are justly indebted to the said State of Mississippi to the amount of ($7,483.22) Seven Thousand four hundred eighty-three and 22/100 Dollars, and that the said Defendants are nonresident of this State; and the land of said debtor being subject of said suit;

We therefore command you that you attach the said defendants named above by their real estate in your county, to the value of said demand and costs of suit, and that you safely keep the same according to law, so as to compel the said defendants to appear before the said Chancery Court, at Rules to be held at the Courthouse in the Town of Tunica in and for said County of Tunica, on the second Monday of September, A. D. 1929, to answer the above complaint.

And that you summon the said A. B. Nickey, S. N. Nickey, W. E. Nickey, and O. L. Nickey if to be found in your County, to appear and answer accordingly; and have there then this writ, with your proceedings thereon.

Given under my hand and official seal, and issued this 23rd day of July, A. D. 1929.

L. C. Shannon, Chancery Clerk, Tunica County, Miss. (Seal.)

[fol. 11] I have this day executed the within writ by going on the land of defendants and there declared that I attached the following land at the suit of plaintiff: NE½ and NE¼ of NW¼ and S½ of NW¼ and S½ of Sec. 2, and a 3 acre strip in said Sec. 2; all that part Sec. 23 lying North of Coldwater river; W½ of Sec. 12; that part of NW¼ of Sec. 24 lying North of Coldwater river; W½ of Sec. 13, all of Sec. 14; all of Sec. 1; SW¼ of NE¼ of Sec. 3; NW¼ of SE¼ of Sec. 3; N½ of NE¼ of Sec. 3; SE¼ of NE¼ of Sec. 3; NE¼ of SE¼ of Sec. 3; S½ of SE¼ of Sec. 3; NE¼ of Sec. 10; E½ of SE¼ of Sec. 10; all of Sec. 11; NE¼ of NE¼ of Sec. 15; S½ of NE¼ of Sec. 15; SE¼ of Sec. 15; all in Township 4, Range 10 West, in Tunica County, Mississippi, the said land being unoccupied by the defendants.

This the 24th day of July, A. D. 1929.

T. E. Salmon, Sheriff, by H. T. Hall, Deputy Sheriff.

[File endorsement omitted.]

[fol. 12] In Chancery Court of Tunica County

Answer—Filed Nov. 11, 1929—and Amendment Thereto—Filed Nov. 10, 1930

To the Honorable R. E. Jackson, Chancellor of the Seventh Chancery Court District of Mississippi:

Come S. M. Nickey and W. E. Nickey, both residents of Shelby County, Tennessee, and Mrs. Orpha L. Nickey, a resident of Los Angeles County, California, three of the defendants named in the bill herein exhibited, and for their answer to the bill exhibited against them, say:

1. The defendants, S. M. Nickey and W. E. Nickey, are residents and citizens of the State of Tennessee and the

said Mrs. Orpha L. Nickey is a resident of the State of California and the- neither they nor either of them has ever been a resident of the State of Mississippi.

2. These defendants say that A. B. Nickey, one of the defendants named in said bill, has been dead since the year 19—, that he was never a resident of the State of Mississippi and was not living at the time the property mentioned in said bill was attempted to be assessed for purposes of taxation.

3. These defendants deny that they constitute a co-partnership, and they say that they are the owners of both tracts of lands mentioned in said bill but they hold it as tenants in common, the share formerly belonging to the said A. B. Nickey having passed to them by his will in the year 19—.

[fol. 13] 4. These defendants say that they were never served with any personal process nor did they have any legal notice of the alleged assessment of said property by the Board of Supervisors of Tunica County, Mississippi, nor did they enter any appearance in any proceeding attempting to make such assessment or levy, nor did they otherwise submit themselves to the jurisdiction of said Board of Supervisors in so attempting to make said assessment and levy so as to enable said Board of Supervisors or any other taxing authority in the State of Mississippi to acquire jurisdiction of these defendants or either of them so as to give either of them any such legal notice as will support a personal judgment against them or either of them so as to make the debt set forth in the bill a valid and subsisting legal claim against either of these defendants personally.

5. The defendants further say since said Board of Supervisors and other taxing authorities in the State of Mississippi have acquired no jurisdiction of the person of either of these defendants, if this Honorable Court should render a personal decree against them or either of them for the alleged debts set forth in said bill, the rendition of such a decree would constitute a taking of the property of these defendants and each of them, without due process of law and would violate the rights of each of these defendants, as guaranteed to them under the Constitutions of the

United States and of the State of Mississippi, relating to such matters and the right to render such personal decree against either of these defendants is denied by each of them.

6. These defendants further say that the Legislature of the State of Mississippi is not vested with the power, under the said provisions of the aforesaid constitutions, to enact any statute which would make the assessment or levy of [fol. 14] any taxes under the laws of the State of Mississippi a debt against a nonresident of the State of Mississippi, without the personal service of process, the appearance of the defendants or the submission of said defendants to the jurisdiction of the taxing authorities of said State and any attempt on the part of the Legislature to pass such a law is a violation of the Constitutions of the United States and of the State of Mississippi and of the rights of these defendants thereunder.

7. These defendants deny that any of the lands mentioned in said bill were duly and legally assessed to the said A. B. Nickey & Sons for purposes of taxation for the year 1928 and the defendants deny that any of said land was legally assessed or any lawful tax levied thereon to any other person or that said land or any part of it became, by reason of any such assessment and levy, subject to any charge for taxation for said year and the defendants say that no such assessment or levy was lawfully made by the Board of Supervisors of Tunica County, Mississippi, or any other proper taxing authority of the State of Mississippi, so as to make any part of said lands subject to any of the charges mentioned in said bill as constituting taxes against it for said year 1928 and these defendants say that said taxing authority did not pursue the proper legal course to acquire jurisdiction over the aforesaid land or any part thereof so as to make the alleged assessment and levy mentioned in said bill and the taxes alleged to be due thereunder, a lawful charge against said lands of either of these defendants.

8. These defendants further say that, having failed to make any valid assessment or levy of taxes against said lands for the year 1928, the Board of Supervisors had no authority to make any levy of said taxes for said year

[fol. 15] and that their attempt so to do is void and is not sufficient to constitute the alleged debts a lawful charge against said lands or any part of them.

9. These defendants say that the complainant in this case has no right to recover of these defendants or either of them any alleged sum of money due Lake Cormorant Drainage District as taxes, or any printer's fee, or clerk's fee, or any sheriff's fee, or any damages of any kind whatever, as a debt against the defendants or either of them, for the reason that none of the aforesaid drainage taxes or charges come within the purview of the statute making taxes a debt against the person owning the property against which any lawful taxes may be levied and that if any recovery is to be had for any such charges, it must be had in the name of the parties to whom such charges belong and must be recovered by them in an individual capacity and not in the name of the State of Mississippi, and for the further reason that said so called drainage taxes are not taxes, but constitute local assessments which bind only the property against which said assessment is made.

10. These defendants say that it is not material to this issue what has been done with any lands in DeSoto County, Mississippi, and is of no concern of the complainant in this case, since said lands are not involved in this suit, but these defendants deny that any lands they own in Tunica County, Mississippi, exclusive of the timber thereon, are worth less than any taxes alleged in this bill to be due against said land.

11. These defendants say that, if they are mistaken in the allegations of this answer, to the effect that the assessment and levy of said taxes, as against these defendants and said land, are void and of no effect, then the bill of the complainant, with the assessment roll to which reference is [fol. 16] made therein, show that said land is worth many times more than any alleged taxes assessed and levied against them, and therefore, the complainant and the Governmental Agency for which he sues have a complete and adequate remedy at law for the collection of such taxes, to which they have not resorted, but that on the contrary, said lands were not offered for sale by the Tax Collector of Tunica County, Mississippi, as provided by law, but that said lands were withdrawn from sale by said Tax Collector

at the instance and under the direction of the complainant and that he prevented a sale of said lands by so directing the Tax Collector not to offer said lands for sale.

12. The defendants deny that the property remaining to them in the State of Mississippi will not be sufficient to satisfy any alleged debt due by them to the State, County, Levee and Drainage Districts, in behalf of which this suit is prosecuted and these defendants deny that either of said *policitcal* subdivisions will suffer irreparable injury or loss, if the timber shall be removed from the second tract of land mentioned in said bill.

13. The defendants deny that any tax has been levied against said land for the year 1928 or that any tax is now due against any part of said land or that any lawful tax against said land remains unpaid or has become delinquent.

14. The defendants deny that there is now due from either of them any lawful taxes against any of said land, in favor of the State of Mississippi, Tunica County, the Yazoo-Mississippi Delta Levee District, Lake Cormorant Drainage District of any taxing district of said County or any costs, damages or any other charge now remains unpaid, for which the complainant in this case is entitled to sue.

[fol. 17] 15. The defendants deny that said land is chiefly valuable on account of the timber growing thereon and if any lawful taxes are now due, have been levied or assessed against said land and these defendants say that the bill and assessment roll to which reference is made therein show that said land, exclusive of the timber and all improvements has a value far in excess of any alleged taxes due against any of said land.

16. These defendants deny that the cutting of any timber on said lands on which the alleged taxes have become a charge will deprive any of the taxing districts mentioned in said bill of any taxes justly due or owing by these defendants or against said lands.

17. These defendants deny that the complainant has any right to restrain the cutting of any timber on the first or second tract of land mentioned in said bill or resort to said second tract of land in any manner whatsoever for the collection of any taxes against the tract of land first named in

said bill and this, whether said taxes are a lawful charge against said first named tract of land or not.

18. The defendants deny that either of them is in default for public money, as principal or in any other capacity.

19. These defendants further say that the complainant in said bill has no right to maintain this action for an injunction against the cutting of said timber on account of any pretended drainage taxes, for the reason, that it is and was the purpose of the levying of such so called taxes to clear and reduce said land to a state of cultivation and to promote agriculture by the use of said land for said purpose.

20. The defendants deny that they are partners, and for further answer to the bill herein exhibited against them say [fol. 18] that said supposed assessment is void as a judgment against them for indefiniteness as to parties defendant.

21. The defendants say that Tunica County embraces only one judicial district and that there was no authority of law for the meetings of the board of supervisors at which all of the proceedings relating to the assessment and levy of the taxes sued for in the complainant's bill, and all such proceedings are void.

Come these defendants and for their amended answer in the above styled cause, by way of amendment, say:

22. Section 8189 of Hemingway's Code of 1927. the section under which this action is prosecuted, is void and of no effect, because it violates the Constitutions of the United States and of the State of Mississippi, in that it deprives these defendants of the right to have the land against which the said taxes are alleged to be due, sold to pay the said alleged debt, which right is a substantial and valuable property right, in that if there is any right to elect which remedy, the remedy by sale of said land, or the remedy by action in the nature of a personal action, shall be pursued by the State to recover said taxes, these defendants have been deprived of their property without due process of law, because the Attorney General advised and directed the tax collector of Tunica County to violate the statutes of the State of Mississippi, by refusing to sell said land for its taxes at the time provided by law, which date of sale was

past when this suit was filed, whereas, it is the universal practice of tax collectors in Mississippi, as it is their mandatory duty under the laws thereof, to offer for sale and sell, on the First Monday in April, after default in the payment of the taxes thereon all lands so in default, to an in-
[fol. 19] dividual purchaser, for the full amount of the taxes thereof, and in default of bids, the statutes of Mississippi operate, and have been construed, to make the State of Mississippi the purchaser thereof, for the full amount of the taxes due thereon, which sale so made, either to an individual purchaser or to the State, constitutes payments in full of the taxes thereon.

23. The said tax collector pursued the course advised and directed by said attorney general, and refused to discharge his said duty in the respects aforesaid, although on the First Monday in April, 1929, at the time provided by law for said sales, the said tax collector offered for sale and sold all other lands in said county, upon which the taxes had not been paid, which lands belonged to a great number of persons, both residents and non-residents of the State of Mississippi, which sale of said other lands operated as payment and as a full discharge of said alleged debts of said other land owners and relieved them of their personal liability therefor, and by their said unequal and oppressive conduct, violated the rights of these defendants under the Constitution of the United States, in the respects that said conduct amounts to a denial by the State of Mississippi and its said officers of the equal protection of the laws of said State, which is secured to these defendants as to all other persons within its jurisdiction and the prosecution of this suit to effect will result in depriving these said defendants of their property, without due process of law, in violation of the constitutions of the United States and of the State of Mississippi.

24. The defendants further say that by reason of the said refusal of said tax collector to perform his said duty in selling said land, he cannot recover his said costs and damages, as sued for herein.

25. The defendants further say that by reason of the wilful and oppressive conduct of said tax collector and at-
[fol. 20] torney general and the refusal of the said tax collector to sell said land, which sale would have resulted

in the payment of said taxes and in the liquidation of said alleged debt, this suit cannot be maintained to effect, as said conduct on the part of the said officers amounted to a refusal to avail themselves of the benefit of a complete payment of said debt, in accordance with the laws of the State of Mississippi and that said action cannot be prosecuted to the annoyance and expense of these defendants.

26. For further answer, these defendants say that Section 8189 of Hemingway's Code of 1927, is void and unenforceable, for the reasons that it provides for no means by which any personal notice shall be given to a property owner in making an assessment of taxes, nor is there any provisions in the statutes or constitution of the State of Mississippi which provides for any summons to compel the personal appearance of any defendant or to support a personal judgment against such defendant, nor is there any authority under the statutes or constitution of the State of Mississippi vested in the tax collector, the board of supervisors or the Chancery court the power to so summons such defendant or render a personal judgment against him in so making said assessment of property under the general revenue statutes or the drainage statutes of the State of Mississippi, and your defendants say that, in making drainage assessments, the Chancery court proceeded under a purely statutory power, and as such a court, can exercise no function beyond that which is conferred by said drainage statutes, nor do the *the* constitution and statutes of the State of Mississippi vest any judicial power in the tax collector or the board of supervisors so to do.

[fol. 21] Now having fully answered, the defendants pray that they may be dismissed with their reasonable cost.

Gore & Gore, Solicitors for Defendants.

[File endorsements omitted.]

[fol. 22] In Chancery Court of Tunica County

Bond—Filed Aug. 31, 1929

We, Mrs. Orpha L. Nickey, S. M. Nickey and W. E. Nickey, Principals and the United States Fidelity & Guaranty Company of Baltimore, Md., surety, are held and bound to pay to the State of Mississippi the sum of Fifteen

Thousand Dollars, unless the said principals shall satisfy and decree which may be recovered against them by the State of Mississippi, ex Rel. Rush H. Knox, Attorney General in that certain attachment suit filed against the said principals for $7,483.22 returnable before the Chancery Clerk of the above named County on the 9th day of December, 1929.

Witness our hands the 15th day of August, 1929.

Mrs. Orpha L. Nickey, by W. E. Nickey, Attorney-in-fact. W. E. Nickey, S. M. Nickey, by W. E. Nickey, Attorney-in-fact. United States Fidelity & Guaranty Co., by R. L. Pearson, Agt. & Atty.-in-fact. (Seal.)

Countersigned:

United States Fidelity & Guaranty Co. W. A. Cox, Resident Agent, State of Mississippi.

The foregoing bond is hereby approved this the 31st day of August, 1929.

L. C. Shannon, Chancery Clerk. (Seal.)

[File endorsement omitted.]

[fol. 23] In Chancery Court of Tunica County.

Statement of Evidence

By Mr. Jaquith: The complainants offer in evidence notice given by the tax assessor of Tunica County, Mississippi, July 6th, 1928, as it appears in the official record of Tunica Times Democrat, Vol. 25, No. 32, dated July 12th, 1928, same volume, number 33, dated July 19th, 1928, same volume, number 34, July 26th, 1928, and same volume, number 35, August 2nd, 1928, as exhibit number 1.

By Mr. Gore: The defendants object to the introduction of this notice on the ground that the paper in which notice was published is not competent evidence and not admissible in evidence to prove the validity of the notice.

By the Court: I will reserve the ruling.

[fol. 24] EXHIBIT #1

Assessor's Notice to Taxpayers of Filing of the Personal and Real Estate Rolls

Pursuant to the requirements of Section 4303, Code of 1906, I, John A. Veach, Assessor of Tunica County, Mississippi, do hereby give notice that I have returned and filed the 1928, Personal Roll, also the 1928, Realty Roll of said county in the office of the Clerk of the Board of Supervisors of said county, on the 29th, June, 1928, as provided by Section 8, of Chapter 323, of the laws of Mississippi of 1920; and that the Board of Supervisors of said county will immediately, at the July, 1928, meeting proceed to equalize such rolls; and at the August, 1928, meeting of said Board of Supervisors will hear all objections to same.

Witness my signature this the 6th day of July, 1928.

John A. Veach, Tax Assessor of Tunica County, Mississippi.

7-12-3t.

[fol. 25] Mr. Jaquith: The complainant offers in evidence notice signed by the Board of Supervisors of Tunica County, Mississippi, by L. C. Shannon, Clerk, dated July 3rd, 1928, appearing in the Tunica Times Democrat, Vol. 25, number 31, dated July 5th, 1928, same volume, number 32, July 12th, 1928, same volume, number 33, July 19th, 1928, and same volume, number 34, July 26th, 1928, same volume, number 35, August 2nd, 1928, and which notice is directed to the taxpayers of Tunica County, Mississippi, and ask that this be made exhibit 2 by the Complainants.

By Mr. Gore: Defendants object to the introduction of this as evidence of notice for the reason set out in our objection to the notice by the Tax assessor, exhibit 1.

By the Court: Ruling reserved.

By Mr. Dulaney: These copies of paper are filed with the Clerk of the Chancery Court pursuant to law; that can be proven, their identification can be proven by the Clerk.

By Mr. Gore: We waive the proving of that by the testimony of the Chancery Clerk, but still reserve the same objection as to the competency of it as to the matter of establishing the values of the assessment rolls.

By Mr. Sharp: But it is admitted that proof of publication of notice was duly filed with the Chancery Clerk?

By Mr. Gore: Our views on this are that these matters must be established by the minutes of the Board of Super- [fol. 26] visors and that is the only competent source through which this evidence can be established.

By Mr. Sharp: It is agreed that the assessment rolls may be introduced corresponding the exhibits, together with Assessor's affidavit to land roll, dated June 29th, 1928, filed with the Chancery Clerk June 29th, 1928, and the order of the Board of Supervisors made on July 3rd, 1928, properly certified to and pasted on the roll, and the order of State Tax Commission, dated Nov. 3rd, 1928, approving the assessment roll for the year beginning February 1st, 1928, in the manner prescribed by law.

By Mr. Gore: We do object to the order of the State Tax Commission because it ought to be attached to the assessment roll, and for the further reason that the order of the State Tax Commission does not state the facts necessary to give the State Tax Commission jurisdiction over the assessment of Tunica county for the purpose of revising and equalizing assessments as between Tunica and the other counties of the State.

By the Court: Ruling reserved.

[fol. 27] EXHIBIT #2

To the tax-payers of Tunica County, State of Mississippi:

You will please take notice that the assessment of real and personal property on the rolls for 1928 have been changed and corrected by this Board so as to comply with the Laws of this State, and that said revised rolls are now open for examination, and that any objection to any assessment contained in said revised rolls must be made in writing and filed with the Clerk of this Board on or before the first Monday of August, 1928, at his office in the town of Tunica, said County, and that any or all assessments to which no objection is then and there made, will be made final.

This the 3rd day of July, 1928.

The Board of Supervisors of said County, by L. C. Shannon, Clerk of said Board. (Seal.)

[fol. 28] Mr. Jaquith: Complainants introduce in evidence order of the Board of Supervisors made July 3rd, 1928, appearing in Minute Book 13, page 53, which shows that the assessment roll was changed and corrected and directing notice to the tax payers of the filing thereof, and ask that it be made exhibit 3 to testimony of complainants.

Mr. Gore: Defendants object to that for the reason that it does not retain to the board jurisdiction over the subject matter to be considered by the Board as provided by law; we object to it and move to exclude it for the reason that the sheets themselves show on its face that this assessment is for 1927 and 1928 when under the law the assessments should have been made for the years 1928 and 1929 as shown in the order just read by counsel for complainant; we move to suppress and exclude that roll as evidence of this assessment for the reason that it shows on its face the fact that it is for other years than the year 1928.

By Mr. Sharp: The taxes sued for are for 1928 and the orders recite the approval of the roll for 1928. The fact that they used an old printed form which were on hand before the law changed making assessments for 1926 and 1927, we don't think that material.

By the Court: I will reserve the ruling.

[fol. 29] NOTE RE EXHIBIT 3

For Exhibit No. 3, see Exhibit No. 2 on page No. 27, of this record. The two exhibits being identical.

[fol. 30] Mr. Jaquith: We offer in evidence order of Board of Supervisors, shown at page 79 of Minute Book 13, as exhibit 4.

EXHIBIT 4

[fol. 31] STATE OF MISSISSIPPI,
Tunica County:

Be it remembered that on this the 6th day of August A. D. 1928, the same being the first Monday in said month and a day fixed by law for holding a regular meeting of the Board of Supervisors of said County, there was begun and held a regular meeting of said Board in the Courthouse in the Town of Tunica, said County and State, when for said

County there were present: Dr. G. M. Shaw, President, District No. 1; J. L. Harris, District No. 2; S. A. Withers, District No. 3; S. C. Wilson, District No. 2; R. T. Mottley, District No. 5, and, also the following officers were present: L. C. Shannon, Clerk, and T. E. Salmon, Sheriff.

It is ordered that the board do now adjourn until Tuesday Morning, August 7th, 1928, at 9 o'clock.

G. M. Shaw, President.

Tuesday Morning, August 7th, 1928, the board met pursuant to adjournment when there were present the following members, to-wit: Dr. G. M. Shaw, District No. 1; J. L. Harris, District No. 2; S. A. Withers, District No. 3; S. C. Wilson, District No. 4; R. T. Mottley, District No. 5, and also the following officers were present: L. C. Shannon, Clerk, and T. E. Salmon, Sheriff.

It is ordered that the Board do now adjourn until tomorrow morning at 9 o'clock.

G. M. Shaw, President.

[fol. 32] Wednesday Morning, August 8th, 1928, the board met pursuant to adjournment; present for said County were the following members: Dr. G. M. Shaw, President, District No. 1; S. A. Withers, District No. 3; S. C. Wilson, District No. 4; R. T. Mottley, District No. 5; also the following officers were present: L. C. Shannon, Clerk and T. E. Salmon, Sheriff.

It is ordered that the board do now adjourn until Thursday Morning, August 9th, 1928, at 9 o'clock.

G. M. Shaw, President.

Thursday Morning, August 9th, 1928, the board met pursuant to adjournment when for said county there were present the following members to-wit: Dr. G. M. Shaw, President, District No. 1; S. A. Withers, District No. 3; S. C. Wilson, District No. 4; R. T. Mottley, District No. 5; also the following officers were present: L. C. Shannon, Clerk, and T. E. Salmon, Sheriff.

[fol. 33] It is ordered that the Board do now adjourn to meet again at 9 o'clock A. M., on Tuesday, the 21st day of August, 1928, at the Board of Supervisors Office in the Courthouse of Tunica County, Mississippi, in the Town of Tunica, for the purpose of hearing complaints to the assessment rolls of said County for the year 1928-1929 as equal-

ized and the entering of such orderes on such complaints as may be filed as to the said Board may seem proper and for the purpose of finally approving the Land Assessment Roll of the year 1928-1929 and the Personal Assessment Roll of the year 1928 and the doing of all other acts and making of all other orderes with reference to said assessment rolls as to said Board may seem necessary and proper.

This August 9th, 1928.

G. M. Shaw, President.

[fol. 34] Pursuant to the above and foregoing order it is ordered that the board do now adjourn until Tuesday Morning at 9 o'clock, August 21st, 1928.

Dr. G. M. Shaw, President.

Tuesday Morning, August 21, 1928, the board met pursuant to adjournment when for said County there were present; Dr. G. M. Shaw, President, Beat No. 1; S. A. Withers, Beat No. 3; S. C. Wilson, Beat No. 4; R. T. Mottley, Beat No. 5; J. L. Harris, Beat No. 2; absent: — Officers. Present: L. C. Shannon, Clerk, and T. E. Salmon, Sheriff.

[fol. 35] Mr. Jaquith: Complainants offer in evidence the order of the Board of Supervisors, as shown in Minute Book 13, pages 80 and 81, as exhibit No. 5.

Mr. Gore: Defendants object to the introduction of that order for the reason that the order and notice does not contain sufficient jurisdictional facts to constitute this a valid assessment of taxes.

By the Court: Ruling reserved.

EXHIBIT 5

[fol. 36] 1928

Order of the Board of Supervisors

SUPERVISORS COURT, AUGUST, 1928, TERM

STATE OF MISSISSIPPI,
Tunica County:

The Board of Supervisors of said County, after having given notice to the Tax payers of said County by publishing the following:

"To the Tax Payers of Tunica County, State of Mississippi:

You will please take notice that the assessment of real and personal property on the rolls for 1928 have been changed and corrected by this Board so as to comply with the Laws of this State, and that said revised rolls are now open for examination, and that any objection to any assessments contained in said revised rolls must be made in writing and filed with the Clerk of this Board on or before the First Monday of August 1928, at his office in the Town of Tunica said County and that any or all assessments to which no objection is then and there made will be made final.

This 3rd day of July, 1928.

The Board of Supervisors of said County, by L. C. Shannon, Clerk of said Board.

In the Tunica Times Democrat, a newspaper located and published at Tunica, Mississippi which notice was published and circulated by said newspaper on the 5th day of July, 1928, in said county and was on the 3rd day of July, 1928, posted in the court house in the town of Tunica in said County by said Clerk.

Met in the supervisors room in *in* the courthouse on the 6th day of August 1928, being the first Monday of August 1928 and in continued session from day to day, and at adjourned meeting held on August 21st; 1928, hearing objec- [fol. 37] tions to assessments, taking testimony of witnesses and examining books, records and papers with reference to the assessments of property. It made such changes in the assessment (as fixed by it on the rolls at its July 1928 meeting) that it was satisfied should be made to fix the assessments of property at its actual value so as to establish an equality and uniformity of taxation according to the value among the tax payers of said county. Now being satisfied that said assessment rolls contain assessments fair, equal, uniform and just according to the value of the real and personal property therein described, it is therefore hereby ordered that the said rolls and the assessments therein now contained be and they are hereby accepted, approved and made final and that the final recapitulation of the said assessment rolls be certified to the State Tax Commission on the blabks furnished by it, as required by law.

G. M. Shaw, President.

[fol. 38] It is ordered that the board do now adjourn until its next regular meeting.

G. M. Shaw, President.

[fol. 39] Mr. Jaquith: Complainants next offer in evidence order of State Tax Commission, which appears on the minutes of the Board of Supervisors of Tunica County, Mississippi, in Minute Book 13, at page 115, as exhibit 6 (six).

Mr. Gore: We object to the introduction of that order for the reason that it does not contain facts necessary to give the State Tax Commission jurisdiction to approve assessments rolls of Tunica County.

By the Court: Ruling reserved.

EXHIBIT 6

[fol. 40] STATE OF MISSISSIPPI,
County of Tunica:

Be it remembered that on this the 5th day of November A. D. 1928, the same being the first Monday in said month and a day fixed by law for holding a regular meeting of the Board of Supervisors of said county, there was begun and held a regular meeting of said Board in the Courthouse in the Town of Tunica, said County and State when for said County there were present Dr. G. M. Shaw, President District No. 1; J. L. Harris, District No. 2; S. A. Withers, District No. 3; S. C. Wilson, District No. 4; R. T. Mottley, District No. 5; also the following officers were present: T. E. Salmon, Sheriff and L. C. Shannon, Clerk.

[fol. 41] Order of State Tax Commission

It appearing to the satisfaction of the State Tax Commission of the State of Mississippi, after visiting the several counties of the State, conferring with the Assessors thereof, and studying the values of the various classes of properties therein, the economic conditions thereof, and the methods employed by the Assessors and Supervisors in making and equalizing the assessments thereof, and after making a careful examination of the recapitulations of the assessment rolls of real and personal properties of the sev-

eral counties and a comparison of the assessments therein contained, that the assessments of the various classes of real and personal properties on said assessment rolls of Tunica County for the tax year 1928, as shown by the foregoing statement (appearing on the reverse side hereof) are equal and uniform with those in the other counties of the State; it is therefore ordered that the Chairman of this Commission mail to the Board of Supervisors of said County a notice that the assessments of said county are acceptable to said Commission, and that copies of said rolls be made and certified to the Tax Collector and to this Commissions in accordance with the requirements of Chapter 323, of the Laws of 1920.

Ordered and adjudged, this the 19 day of September, 1928.

Chairman's Certificate

I, L. C. Franklin, Chairman of the State Tax Commission of the State of Mississippi do hereby certify that the above is a true and correct copy of an order adopted by the said Commission on the date therein named, and the Board of Supervisors of said County are notified to deal with said roll as required by law, and as directed in said order.

[fol. 42] Witness my signature this the 19 day of September, 1928.

L. C. Franklin, Chairman.

[fol. 43] Mr. Jaquith: Complainants next introduce in evidence order of Board of Supervisors of Tunica County, Mississippi, as the same appears in Minute Book 13, at pages 116, 117 and 118, levying taxes for the fiscal year 1928, and ask that it be marked exhibit 7.

Mr. Gore: We make the same objection to that order as to levying taxes as to the others.

By the Court: Ruling reserved.

Exhibit 7

[fol. 44] In the Matter of the Tax Levy for the Year 1928

It is ordered by the Board that there be and is hereby levied on all the taxable property in Tunica County, Mississippi, a tax for the fiscal year 1928, as follows, towit:

A tax of 75% of the State Tax, being 6 mills on the dollar, on all the taxable property, in Tunica County, Mississippi, for General County purposes.

A tax of 25% of the State Tax, being 2 mills on the dollar, on all the taxable property in Tunica County, Mississippi, for Common School purposes.

A tax of 21.87% of the State Tax, being 1¾ mills on the dollar on all the taxable property in Tunica County, Mississippi, being a tax for the purpose of retiring the bonds and paying the interest on the bonds issued for the construction of the Courthouse.

A tax of 9.37% of the State Tax, being ¾ of a mill on the dollar, on all the taxable property in Tunica County, Mississippi, being a tax for the purpose of retiring the bonds and for the paying of the interest on the bonds issued for the construction of the Main highway.

A tax of 3.12% of the State Tax, being ¼ mill on the dollar on all the taxable property in Tunica County, Mississippi, being a tax for the purpose of paying the interest on the Road Bonds Issued in 1910.

A tax of 75% of the State Tax, being 6 mills on the dollar on all of the taxable property, in Road Dist. No. 2, Tunica County, Mississippi, being a tax for the purpose of maintaining the roads, for the purchase of road machinery, road material and other paraphernalia incidental to road construction and for the payment of salaries to road crew.

[fol. 45] A tax of 43.75% of the State Tax, being 3½ mills on the dollar on all of the taxable property in Special Road Dist. No. 2 of Tunica County, Mississippi, being a tax for the purpose of paying the interest and for the payment of bonds when they become due.

A tax of 21.87% of the State Tax, being 1¾ mills on the dollar on all the taxable property in Tunica County, Mississippi, being a tax for the maintenance of the Agricultural High School, as per schedule attached in budget.

A tax of ¼ mill on the dollar, being 3.12% of the State Tax, on all of the taxable property in Tunica County, Mississippi, being a tax for the purpose of maintaining the Agricultural High School Building, for the construction of additions thereto.

A tax of 6.25% of the State Tax, being ½ mill on the dollar on all the taxable property in Tunica County, Miss.,

being a tax for the purpose of constructing a Gymnasium at the Agri. High School and its equipment necessary thereto.

So ordered this the 5th day of November, 1928.

G. M. Shaw, President.

[fol. 46] It is ordered that the board do now adjourn until its next regular meeting.

G. M. Shaw, President.

[fol. 47] Mr. Jaquith: We introduce the land roll for the purpose of exhibiting to the Court cover of land roll which shows 1928-1929, Tunica County. At the head of sheets contained within the cover shows caption Assessment 1927-28; though the pages numbered 1 to 86, inclusive show for the years 1927-28 the remainder of the pages being 87 to 122, inclusive, which included recapitulation, shows for the year 1928-29. Pages 123 and 124 show 1927-28. The assessment for the lands in controversy in this case appear on line 4 of page 7, which bears caption for the years 1927-28; all the lands against which taxes herein sought to be recovered appear under caption 1927-28.

By Mr. Gore: We object to the introduction of this statement outside of this assessment roll because it is not competent to establish this as assessment roll for the year 1927-28.

Mr. Jaquith: At the time of the introduction of the roll there are two notices pasted on cover not mentioned and which are now introduced as a part of the roll; the order of the Board of Supervisors made at the adjourned August 1928 meeting which is certified to by the Clerk and pasted on the roll, at the head of which is 1928, Order Board of Supervisors August 1928 term.

Mr. Gore: That is objected to because the order is pasted in the back of the roll is not permissible in evidence; these facts should be proven by the minutes of the Board of Supervisors.

Mr. Jaquith: The order pasted to the assessment roll contains the seal of the Chancery Clerk and his signature. We also introduce certified copy, under the seal of the [fol. 48] Chancery Clerk of Tunica County, Mississippi, of the order of State Tax Commission, dated Sept. 19th,

1928 which has been heretofore introduced as part of the minutes of the Board of Supervisors as appearing on page 115 of Minute Book 13, as exhibit 10.

Mr. Gore: That is also objected to for the same reason.

By the Court: Ruling reserved.

NOTE RE EXHIBIT 10

See pages 41-42 of this record for this exhibit which is previously given under Exhibit No. 6.

[fol. 49] AGREEMENT AS TO CERTAIN FACTS

Mr. Dulaney: It is agreed and admitted that the land assessment roll of Tunica County, Mississippi for the year 1928, which has been introduced, was duly certified to by the Clerk of the Chancery Court of Tunica County, Mississippi and delivered to the Sheriff of said county in the manner and form and as required by law and the Sheriff of said county proceeded to collect and did collect the taxes from said roll for the year 1928.

It is further agreed that on February 1st, 1928, S. M. Nickey, W. E. Nickey and Mrs. O. L. Nickey were the owners of the land described in the bill of complaint, the taxes on which are sought to be recovered in this suit and that they were the owners of said lands as tenants in common. Mr. S. M. Nickey and Mr. W. E. Nickey being owners by their deeds and Mrs. O. L. Nickey being the owners of an undivided one third interest in it under the will of her husband, A. B. Nickey who is now deceased and who died a year prior to February 1st, 1928.

[fol. 50] Mr. JOHN BEACH, a witness for the complainants, being first duly sworn, testified on oath as follows:

Direct examination.

By Mr. Dulaney:

Q. You are the tax assessor of Tunica County, Mississippi?

A. Yes sir.

Q. You were the tax assessor of this county in 1928?

A. Yes sir.

Q. The roll, land assessment roll for Tunica county for the years 1928-29 were originally prepared by you?

A. Yes sir.

Q. That is the roll that has been introduced here this morning?

A. Yes sir.

By Mr. Gore: We object to his testimony in contradiction of what the record shows. He cannot impeach his own act.

By the Court: Ruling reserved.

By Mr. Dulaney:

Q. Did you make up the assessment roll of Tunica county for the year 1928?

A. I did.

Q. Mr. Beach the roll that has been introduced shows a number of items of land assessed to A. B. Nickey and sons, do you recall that to be a fact?

A. Yes sir.

Q. State whether or not before the filing of that assessment roll you had any conference with any one who purported to represent or assumed to represent the owners of the lands which are assessed on that roll to A. B. Nickey & Sons?

A. I did, with Mr. Landgrebe.

Q. The gentleman who is present?

A. Yes sir.

Q. State if you know his connection with A. B. Nickey & Sons, the defendants in this case?

A. Well, Mr. Landgrebe has been looking after their taxes down here for some years; on several occasions he [fol. 51] had been down here and asked me about the taxes and assessments and the valuation placed thereon, and in this particular instance he was down here, I don't remember the date, but he passed my office; he had been up in the court room and passed my office and I saw him; I had mailed blanks out to him earlier in the spring and had not gotten any returns from him so I called his attention to assessments and asked something about valuations and I told him it was about same as before, so that was about all that was said; he said he guessed there was nothing to be done about it.

Q. Where was that conversation?

A. Up stairs in my office.

Q. In this building?

A. Yes, sir.

Q. You refer to blanks you had mailed out, what blanks do you refer to?

By Mr. Gore: We object to the contents of the blanks; if you have copies you might introduce them; don't think that competent.

By Mr. Dulaney:

Q. Have you copy of blanks mailed out?

A. I have copy of some forms of blanks which I mailed out every year, required by tax assessors all over the State to mail these out to residents other than in the county; they are non-residents; I got their address from the Sheriff's office and the requirement of law is to mail out these blanks and I mail them out every year to everybody.

Q. State whether or not the blanks you mailed out were the regular land assessment blanks for the year 1928 that you were required to mail out?

By Mr. Gore: We object to any testimony with reference to the tax assessment blanks in the absence of any notice to us to produce those mailed to us. We make the further objection that any appearance or alleged appearance of waiver by statements of these defendants to the jurisdiction of the Board of Supervisors must affirmatively appear [fol. 52] to have been adjudicated by the Board, evidenced by its minutes, and this must have been done in order to fasten any personal liability on these defendants for any part of this tax.

By Mr. Sharp: We are not claiming a personal judgment; our contention is, among others, that when these people acquired, owned and operated it they took it with full knowledge of the laws of the State of Mississippi of their right to be heard, date when equalization took place, as provided by law; had knowledge of the law giving them the right to be heard at specified times. Second: That even though ignorance of the law excused them we are not attempting now to enforce that assessment as a personal judgment, but we are bringing them in here now to give them their day in Court.

By the Court: I will reserve the ruling.

By Mr. Dulaney:

Q. Where did you get these blanks that you mailed to the taxpayers?

A. Well, they are blanks distributed by the State Tax Commission and printed by the Mississippi Printing Co.

Q. By whom are the forms printed; by the State Tax Commission?

A. Yes sir, they have authority to prescribe the forms.

Q. To whom do you mail these out?

A. I mailed these as well as I remember to the Green River Lumber Co. care Green River Lumber Co.

Q. At what point?

A. Memphis, Tenn.

Q. Do you know who the parties interested in the Green River Lumber Company are?

A. Well, no sir, I do not, I don't know any of them personally.

[fol. 33] Q. How did you happen to mail the blanks to A. B. Nickey & Sons, care Green River Lumber Co.?

A. Personal assessments have always been that way and I sent the personal blanks with the land blanks.

Q. Were the personal blanks returned for this particular year?

A. I don't recall whether they were or not; I don't believe they were; land blanks were not.

Q. Mr. Beach I notice in the assessment roll, number of pages headed 1927-28 and number of pages headed 1928-29, could you explain how that happened?

By Mr. Gore: We object to that on the ground that he cannot impeach his own record.

By the Court: Ruling reserved.

A. We didn't have enough blanks and these other blanks were used by the deputies in making it up; we knew this at the time the rolls were made; didn't think anything would come up about the validity of the roll.

Mr. Dulaney: Take the witness.

Cross-examination.

By Mr. Gore:

Q. Mr. Beach were you here in July when the Board of Supervisors considered this roll?

A. Yes sir, I was.

Q. How long did you stay there with them in July?

A. I was here with them the entire session.

Q. How many days were they in session?

A. I cannot recall just how many days it was.

Q. Now for your information I will state the minutes appearing at page 359 shows they adjourned the 30th day of July, I want to know if it is not a fact that in making up this roll, the figures in black ink through which lines w-re [fol. 54] drawn, say, for instance, line 1, page 9 of this assessment roll, if the figures through which pen was drawn, $5,111.00 were your figures and your assessment?

A. Yes, sir.

Q. And the figures in column 5, page 9—$9,232.00 are the values as fixed by the Board of Supervisors?

A. Yes, sir.

Q. Now, so on through lines 9, 10, 11 and 12 the figures through which pen marks have been drawn are your figures and the other figures are revisions made afterwards?

A. Yes, sir, by the Board of Supervisors?

Q. This roll contains 124 pages and I will ask you if it is not a fact that these revisions occure practically all the way through this roll?

A. Yes, sir.

Q. Now I want to ask you if these entries of these other figures were not made by the Clerk after the Board of Supervisors adjourned, and if it would not have been a physical impossibility for this to have been done within the two days and the work done that was done?

By Mr. Sharp: We object to that; the roll speaks for itself.

By the Court: Ruling reserved.

A. Now that calls for an explanation there because as well as I remember in 1928 on all uncleared land in the county the State Tax Commission gave us a raise and that took in approximately 140,000 acres of land; that is what we got, $1.00 flat on all uncleared land in the county, and this was to be figured, in column 11 and 12 here, in column 11 number of thousand feet board measure timber——interrupted

By Br. Gore: I asked you is it not a physical impossibility and was it not a physical impossibility for all these corrections to have been made in two days, and if you don't know as a matter of fact that these figures were made and put on the roll by the Clerk after the Board of Supervisors adjourned; is that or not a fact?

A. They were not put on——

[fol. 55] Q. Is it a fact or not?

A. What?

Q. That these figures were made up and put on there by the clerk after the Board adjourned?

A. No they were not, not these in column- 11 and 12.

Q. Which ones were?

A. Red figures were made by order of the State Tax Commission.

Q. Who made the figures; who did the work and made these figures and when were they made?

A. Mr. Shannon made figures here.

Q. When? Was it after the Board adjourned?

A. These figures were made after the Board adjourned in the total column. And these figures were put down by me at the July meeting of the Board of Supervisors.

Q. After adjournment?

A. While in session.

Q. You are talking about the figures in columns 10, 11 and 12?

A. Yes, sir.

Q. They were made by you before the Board adjourned at its July meeting?

A. Yes, sir.

Q. Why didn't you put them down that way to start with?

A. Extra assessment of timber; the Board had ordered timber assessment over the county and I asked for timber to be estimated.

Q. Cruised?

A. Yes, sir, and this timber cruise was put on at the July meeting of the Board in columns 11 and 12.

Q. Why was it you didn't put this on before you filed the roll?

A. I didn't have the information until the cruise was made and it was not made until June.

Q. But the figures in column 5 and in column 10 were made after the adjournment of the Board by the Clerk: he didn't work on it at the same time?

A. No, sir, they were made afterwards in column 5.

[fol. 56] Q. Now that is also true of column 1 Mr. Beach?

A. Yes, sir.

Q. That is also true under heading "Road District No. 2—$9,232.00 valuation and that was put there by Mr. Shannon after the Board adjourned?

A. Yes, sir.

Q. He is the Chancery Clerk?

A. Yes, sir.

Q. Now with reference to Mr. Landgrebe you have no recollection that he didn't return the land assessment blank for 1928 to you?

A. Yes, sir, he did not.

Q. You don't know when you had this conversation?

A. No, sir.

Q. He didn't tell you to make the assessment of A. B. Nickey & Sons at any figure?

A. He didn't tell me.

Q. You are not sure about the time of the year?

A. Well, along about May or June.

Q. Didn't you tell Mr. Dulaney you didn't know what time?

A. I don't know, but think in May.

Q. You don't know whether it was the year 1928 or not?

A. Yes, sir.

Q. What was the occasion for his coming to your office?

A. I called him by; he was passing through the hall.

Q. You don't know whether he was authorized by any of the Nickeys to turn in the assessment at all?

A. I don't except -h-t he had been heretofore doing that.

Q. When?

A. On several occasions he had made statements down here of the real estate and the Green River Lumber Co.

Q. The Green River Lumber Company a corporation?

A. I don't know.

Q. Now what was it he said to you about this, is your statement correct that he asked you what the valuation was

[fol. 57] and you told him about as it had been and he walked off, that is substantially what was said?

A. I called him by the office and told him it was getting late and he had not mailed the blanks in and he discussed the values, as to what other people were giving in at.

Q. He didn't tell you to make any assessment against A. B. Nickey & Sons at all?

A. I don't know. He said that was about right, or something to that effect.

By Mr. Gore: That is all.

Redirect examination.

By Mr. Jaquith:

Q. You have testified on cross-examination that you made certain changes in the roll, what were these changes which you made Mr. Beach?

A. There on timber assessments in column- 11 and 12.

Q. State whether or not these were changes ordered to be made by the Board of Supervisors at its July meeting.

By Mr. Gore: We object to that for the reason that evidence of what the Board ordered should be shown by the minutes.

By the Court: Ruling reserved.

A. They were made at the instance of the Board of Supervisors.

Q. These changes were in separate, individual sections of property?

A. Yes, sir.

Q. In other words these changes w-re made in the number of thousand feet of board measure of timber and also in the valuations excluding timber and improvements on the timbered land and the valuation of the timber thereon were they not?

[fol. 58] By Mr. Gore: Object as leading.

By the Court: Objection sustained, as to leading.

A. Column 10 raised by order of State Tax Commission.

Mr. Gore: We object to that as to order of State Tax Commission.

By Mr. Jacquith:

Q. Now the changes referred to as having been made by Mr. Shannon, state whether or not these were in the total column total valuation of any section of property as shown by the assessment roll as equalized?

A. Yes, sir.

Mr. Jaquith: That is all.

By Mr. Gore:

Q. I notice on line 6, on page 9 of this roll the land there assessed to A. B. Nickey & Sons, acreage changed, who did that?

A. I will tell you about the acreage; I know exactly how it is.

Q. Who made that change there?

A. Mine; if you will notice here 154 acres in uncultivated column, changed back over here to column 9, 270 acres timbered land; changed from one column to another; that is mine.

Q. When did you make that change?

A. These were made at the same time that I made these changes here; column ten made by me too, 9 and 10 and changed from column 13 to column 9, these changes made by me.

Q. Now, for instance, on page 1, column 14 I see figures changed from $1,108.00, your figures, this is struck out and in red ink $1,262.00, assessment of C. S. Gladden?

Mr. Sharp: We object to that; assessment of C. S. Gladden is not involved.

By Mr. Gore: Who made these figures in the column?

A. Mr. Shannon.

Mr. Gore: That is all.

[fol. 59] AGREEMENT AS TO CERTAIN FACTS

By Mr. Dulaney: It is agreed that the Board of Supervisors of Tunica County met July 2nd, 1928, and that its minutes show said Board was in session that day and on July 3rd, 1928, and further, that the minute of said Board show it met for its regular August meeting August 6th and

was in session the 6th, 7th, 8th and 9th, adjourned from day to day until August 9th and that the Board met in regular session on November 5th, 1928, according to its minutes.

By Mr. Gore: It is admitted by counsel for both sides that orders heretofore introduced by complainants in this cause constitute all the orders as made and appearing from the minutes of the Board of Supervisors of Tunica County, Mississippi, relative to the assessment of the lands against which the taxes are sought to be recovered in this suit and that no further orders were made by the Board of Supervisors than those appearing in evidence, but the rolls show changes made in equalization.

By Mr. Jaquith: It is further agreed that the particular assessments of the lands herein involved were not objected to at the August, 1928, meeting by any of the parties then and now owning the lands in controversy.

[fol. 60] By Mr. Jaquith: Complainants offer in evidence order of Levee Board Commissioners, fixing tax rates for the year 1928-29, being a certified copy, certified to by T. J. Collier, Secretary and being offered as exhibit No. 18 by Complainants.

EXHIBIT 18

[fol. 61] Transcript of Order the Board of Levee Commissioners for the Yazoo-Mississippi-Delta Levee District

July 12th Session, 1928.

Be it remembered, That at the above stated Session of the Board of Levee Commissioners for the Yazoo-Mississippi-Delta, an order was then and there made by said Board, which was in the following words and figures, to-wit:

Commissioner Magruder made a motion which was duly seconded by commissioner Blythe that the tax rates for the tax year 1928-1929 be fixed in this Levee District as follows:

1. That the Ad-valorem tax rate in the Counties of De-Soto, Tunica, and Coahoma be fixed at five and one-half mills on the dollar and that the Ad-Valorem tax rate in the Counties of Quitman, Tallahatchie, Sunflower, Leflore, Holmes, Yazoo, and Humphreys be fixed at three and ninety-three one hundred-s mills on the dollar:

2. That the Acreage tax rate be fixed at two cents per acre upon every acre of land within the Levee District;

3. That the tax rate for the Brunswick Extension Levee be fixed — sixteen one hundred-s mills on the dollar in all Counties of the District.

Commissioner Covington made a motion which was duly seconded by Commissioner Parker that the above motion be amended to read as follows:

That the tax rates for the tax year 1928-1929 be fixed in this Levee District for levee purposes as follows:

1. That the Ad-valorem tax rate in the Counties of DeSoto, Tunica, and Coahoma be fixed at five mills on the dollar and that the Ad-valorem tax rate in the Counties of [fol. 62] Quitman, Tallahatchie, Sunflower, Leflore, Holmes, Yazoo, and Humphreys, be fixed at three and fifty-seven one hundred-s mills on the dollar:

2. That the Acreage tax rate be fixed at two cents per acre upon every acre of land within the Levee District.

3. That the tax rate for the Brunswick Extension Levee be fixed at sixteen one hundred-s mills on the dollar in all Counties of the District.

Upon submission of these motions to the action of the Board, the amendment was carried, the vote being seven to three, and the tax rates for the tax year 1928-1929 were declared to be as written in the amended motion above.

I, G. F. Seals, Secretary of the Board of Levee Commissioners for the Yazoo-Mississippi-Delta, do hereby certify that the above and foregoing is a just, true and perfect copy of an order of said Board of Levee Commissioners, made and entered at their July 12th Session, A. D. 1928, as the same appears of record in my office, in the Minute Book F of said Board, on page 281.

Given under my hand and the official seal of said Board of Levee Commissioners for the Yazoo-Mississippi-Delta, this 3rd day of March A. D. 1932.

G. F. Seals, Secretary. (Seal.)

[fol. 63] By Mr. Dulaney: At the request of counsel for the defendants I will state, as a part of the record, that a

conference was held in Jackson, Mississippi between Mr. Ruch Knox, then Attorney General, E. C. Sharp, Assistant Attorney General and myself in regard to the subject matter of this suit, sometime prior to the regular time for selling land for taxes in 1929, and at a conference it was agreed that on my return to Tunica I would request the Tax collector of Tunica County not to make sale of the lands described in the Bill of Compliant in this case for the recovery of taxes on which bill is filed, and that in accordance with that request no sale has been made by the Tax collector of Tunica County, Mississippi, of these lands. It is true they were advertised for sale on First Monday of April, 1929, this request was made perhaps a week or so before that date, date for sale, for the taxes for which this suit is now being prosecuted.

Mr. Dulaney: The complainants rest.

[fol. 64] By Mr. Gore: The defendants now make motion that they be permitted to amend, which amendment proposed will be reduced to writing.

By Mr. Sharp: To which we object.

Br. Mr. Gore: We rest.

This cause came on for further hearing on this the 8th day of December, 1930, being a regular day of the December, 1930, Term of Court at Tunica, Mississippi, upon motion of Defendants to amend and take further proof, the Hon. R. E. Jackson, Chancellor after hearing argument granted said motion, to which the Complainants objected.

Whereupon the following proceedings were had to-wit:

[fol. 65] AGREEMENT AS TO SALE OF LANDS, ETC.

December 8th, 1930.

By Mr. Gore: It is hereby agreed by and between counsel for the complainants and counsel for the defendants that it is the general custom in the State of Mississippi to make sale of lands on which default in the payment of taxes has been made on the First Monday in April of the year succeeding the assessment of the taxes, and that on the first Monday of April, 1929, all lands in default for the payment of taxes, except the lands belonging to these de-

fendants were offered for sale and sold by the Tax collector of Tunica County, Mississippi.

It is further agreed that the lands of the defendants in default for the payment of taxes in April, 1929, were the only lands in Tunica county delinquent for taxes from which the merchantable timber had been removed between the date of the assessment and date set for the tax sale.

[fol. 66] Mr. C. R. LANDGREBE, a witness for the defendants, being first duly sworn, testified on oath as follows:

Direct examination.

By Mr. Gore:

Q. This is Mr. C. R. Landgrebe?

A. Yes, sir.

Q. Mr. Landgrebe you heard the testimony of Mr. Beach, tax assessor of this county in July when we took proof in this case in reference to a discussion of the taxes against this property between you and him, what have you to say about that, whether it was during the year 1928 or some other time?

A. It was some other time.

Q. When was it?

A. It was four or six years prior to that.

Q. Have you discussed it with him either in 1928 or since that time?

A. I have not.

Mr. Gore: Take the witness.

Cross-examination.

By Mr. Dulaney:

Q. Mr. Landgrebe you represented these defendants in connection with their taxes did you not?

A. I did.

Q. For how long a time have you so represented them?

A. For the past twenty years.

Q. With whom do you deal in making agreements or adjustments with reference to taxes in Tunica county; with what representative of Tunica county do you deal?

A. At such times when I had occasion or took occasion I dealt with the Board of Supervisors at their regular meeting, at the time set for such hearing.

Q. Every two years you would receive notice from the tax assessor?

A. Sometimes we would and sometimes not.

[fol. 67] Q. This notice would ask you to list the value of property?

A. They have such notices, such forms.

Q. When did you last receive one of these forms?

A. I don't recall.

Q. Did you receive one in 1929?

A. I could not say. I don't remember receiving any.

Q. Could you state whether or not you received one in 1928?

A. I don't know positively, but think we did receive some of the blank forms.

Q. Did you execute the form in 1928?

A. We did not.

Q. Why didn't you execute the form in 1928?

A. Well, it was not customary for us to execute these forms.

Q. You know Mr. Beach personally?

A. I do.

Q. Were you present when he testified in this case in July, 1930?

A. I was.

Q. Did you at that time inform counsel for the defendants that Mr. Beach was in error?

A. I don't remember positively about that.

Q. Did you file any written protest against this assessment in August, 1928, at the meeting of Board of Supervisors?

A. We did not.

Q. Why was no such protest filed?

A. Well, I don't know, we didn't file any protest.

Q. Did you know at that time how the lands had been assessed?

A. Yes, sir, we knew. We knew partly, at that time how they had been assessed.

Q. What do you mean by partly?

A. As I recall the land was assessed at one time and the timber assessed, equalized a while later; I understand special assessment.

[fol. 68] Q. Some other arrangements?

A. The record will show.

Q. Did you know the land assessment rolls containing these assessments were on file with the Board of Supervisors in 1928?

A. At August meeting?

Q. Yes?

A. No, sir, I didn't know; don't think it was.

Q. When did you first examine that roll?

A. Probably in July or August.

Q. 1928?

A. Yes, sir.

Q. What was your purpose of making examination?

A. I examined the tax rolls quite frequently when passing through counties where the company owns property.

Q. To see whether or not the assessments are satisfactory?

A. For information I usually check up various other matters, deeds and various things of that kind.

Q. Is it your general custom to check up on assessments each time a new assessment is made?

A. Most every time, yes, sir.

Q. Do you occupy an official position with the Green River Lumber Co.?

A. I do, Assistant Secretary and Treasurer.

Q. What is the connection of the Green River Lumber Co. with the defendants?

A. The only connection is that the Green River Lumber Co. has the principal part of the stock, that is the principal part of the stock in Green River Lumber Company is owned by A. B. Nickey & Sons.

Q. The Green River Lumber Co. is a corporation?

A. Yes, sir.

Q. A Lumber manufacturing corporation?

A. Yes, sir.

Q. Does it manufacture into lumber the timber from the lands of these defendants and has it not done that for years?

[fol. 69] A. Not entirely so; in a large measure that is the case.

Q. It also manufactures lumber from other timber than from the timber of these defendants?

A. It does.

Mr. Dulaney: That is all.

By Mr. Gore:

Q. Mr. Landgrebe can you recall offhand the many counties in Mississippi that Mr. S. M. Nickey, A. B. Nickey and Mrs. Nickey own property?

A. Four counties.

Q. You keep the records for the Green River Lumber Co.?

A. Yes, sir.

Q. You also keep up with the tax matters for the Nickeys, you are the clerical man I judge?

A. Yes, sir.

By Mr. Gore: That is all.

The Defendants rest.

Mr. Dulaney: We rest.

Reporter's certificate to foregoing transcript omitted in printing.

[fol. 70] In Chancery Court of Tunica County

[Title omitted]

Motion to Revive—Filed July 17, 1930

George T. Mitchell, Attorney General of the State of Mississippi respectfully shows that since the filing of this suit the Honorable Rush H. Knox has resigned as Attorney General of the State of Mississippi and that the said George T. Mitchell is his successor and is the duly commissioned, qualified and acting Attorney General of said State; wherefore, he moves that this cause be revived in his name as such Attorney General.

E. C. Sharpe, C. A. Jaquess, J. W. Dulaney, Solicitors for Complainant.

[File endorsement omitted.]

[fol. 71] IN CHANCERY COURT OF TUNICA COUNTY

In Vacation

[Title omitted]

ORDER TAKING CAUSE UNDER ADVISEMENT

This day this cause came on for final hearing before the Chancellor in vacation at the Courthouse in Tunica, Mississippi on original bill of complaint, answer of the defendants and proof pursuant to a decree entered herein at the June, 1930 term of said Court.

On motion of George T. Mitchell, Attorney General of Mississippi from which it appears that he is the duly commissioned, qualified and acting Attorney General of the State and the successor of the said Rush H. Knox as such, and defendants consenting thereto, it is ordered that this cause be and the same is hereby revived in the name of the State of Mississippi on the relation of the said George T. Mitchell as such Attorney General.

And the Court having now heard the proof offered by the complainant and defendants and having heard the argument of counsel, by consent of all parties this cause is taken under advisement for the rendition of a final decree herein by the Chancellor in vacation with leave to the complainant to file a brief with the Chancellor on or before July 31st and leave to the defendants to file a brief in reply on or before August 10, 1930.

Thus ordered by the Chancellor at the Courthouse in Tunica, Mississippi, this the 15th day of July, 1930.

R. E. Jackson, Chancellor.

(Endorsed: E M B #8 P 435.)

[fol. 72] IN CHANCERY COURT OF TUNICA COUNTY

[Title omitted]

MOTION FOR LEAVE TO AMEND ANSWER—Filed Nov. 10, 1930

Come the defendants, and move the Court to permit them to amend their answer to the bill herein exhibited against

them and file herewith a copy of said amendment, and pray that the matter set up be in-corporated in said answer as paragraphs No. 22 to and including No. 26 thereof.

Gore & Gore, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 73] In Chancery Court of Tunica County

[Title omitted]

Order Allowing Amendment to Answer

This day came this cause for hearing on the motion of the defendants to amend their answer and it appearing to the Court that said motion should be sustained.

It is, therefore, ordered and decreed that said amendment be and it is hereby allowed, to which action of the Court the complainant excepted.

It is further ordered that the said cause be taken under advisement, for decision and entry of the decree in vacation.

Ordered and decreed this December 8, 1930.

R. E. Jackson, Chancellor.

(Endorsed: E M B 8 Page 447.)

[fol. 74] In Chancery Court of Tunica County

[Title omitted]

Minute Entry

By consent this cause is continued under advisement for the rendition of a final decree by the Chancellor in vacation.

Thus ordered, adjudged and decreed, this the 8th day of June, 1931.

R. E. Jackson, Chancellor.

(Endorsed: E M B #8 P 479.)

[fol. 75] In Chancery Court of Tunica County

State of Mississippi ex Rel. George T. Mitchell, Attorney General,

vs.

A. B. Nickey & Sons

Decree—Filed Jan. 11, 1932

This cause came on to be heard in vacation on the 15th day of July, 1930, pursuant to a decree entered at the June Term 1930 of this court, on original bill of the State of Mississippi ex rel. George T. Mitchell, Attorney General, against S. M. Nickey, W. E. Nickey, and Mrs. Orpha L. Nickey, non-residents of the state of Mississippi, operating and doing business under the firm name of A. B. Nickey & Sons, writ of attachment, proof of publication, answer and amended answer of said defendants, oral and documentary proof, and argument of counsel; and said cause having on said date been taken under advisement to be decided in vacation pursuant to a decree rendered on said date; and having been continued under advisement by order entered at each succeeding term of said court, including the December 1931 term thereof.

And it appearing to the satisfaction of the court that said defendants, as tenants in common, did, on the first day of February, 1928, own the following described lands in Tunica County, Mississippi, to wit:

The NE¼ and the NE¼ of the NW¼ and the S½ of the NW¼ and the S½ of Section 2, Township 4, Range 10, and a 3-acre strip in said Section; also all that part of Section 23, Township 4, Range 10 lying north of Coldwater River, and that part of the NW¼ of Section 24, Township 4, Range 10 lying north of Coldwater River, and the W½ of Section 12, Township 4, Range 10, and the W½ [fol. 76] of Section 13, and all of Section 14, Township 4, Range 10, as shown by the tax rolls of Tunica County, Mississippi; all of said lands lying and being within the Yazoo-Mississippi Delta Levee District, Brunswick Extension District, and also within the Lake Cormorant Drainage District of DeSoto and Tunica Counties.

And it further appearing to the satisfaction of the court that State, County, District, Yazoo-Mississippi Delta Levee

District, ad valorem and Brunswick Extension, Yazoo-Mississippi Delta Levee District acreage and Lake Cormorant Drainage District taxes were duly and legally levied by the proper taxing authorities for the year 1928, and that at the time of the filing of the original bill herein and the issuance of the writ of attachment by this court, none of the taxes so levied against any of said lands for said year had been paid and same were delinquent, and that all of the lands above described had been advertised for sale for taxes, as required by law, by the Sheriff and Tax Collector of Tunica County, Mississippi, and that at the time of the filing of the original bill and the issuance of injunction herein there were due taxes, costs, and damages on said lands as follows, to wit:

State Taxes	$646.81
General County taxes	950.00
Highway Road Bond Interest	60.64
Yazoo-Mississippi Delta Levee ad valorem and Brunswick Extension	477.83
Yazoo-Mississippi Delta Levee acreage	52.26
Beat No. 2 ad valorem and bond interest	768.10
Lake Cormorant Drainage District	3,835.80
Printers' fee	2.40
Clerks' fee	3.60
[fol. 77] Sheriff's fee	7.50
Damages	679.08
Making a total of taxes, costs, and damages due of	7,483.22

as shown by Exhibit "A" to bill of complaint filed herein and supported by the evidence introduced at the trial hereof.

And it further appearing to the satisfaction of the court that pursuant to an order of this court defendants were permitted, in order to have the attachment writ herein issued dismissed, to execute a bond conditioned to pay to the State of Mississippi the sum of $15,000.00, unless the defendants herein shall satisfy any decree which may be rendered in this cause against said defendants, said bond having been executed by said defendants with the United States Fidelity & Guaranty Company as surety thereon.

And it appearing to the satisfaction of the court that the

allegations of the original bill herein are supported by the proof, and that complainants are entitled to the relief prayed for.

It is therefore, ordered, adjudged and decreed that the complainants do have and recover of the said defendants and the surety on the bond filed herein jointly and severally the sum of $7,483.22 for the use and benefit of the State of Mississippi, the County of Tunica, and the various subdivisions thereof, as shown by the tax roll on file, and also for the use and benefit of the Yazoo-Mississippi Delta Levee District, Brunswick Extension, and Lake Cormorant Drainage District, the sums above set out.

And it further appearing to the satisfaction of the court that the said lands above described had been duly advertised for sale for taxes due thereon by the Sheriff of said County prior to the filing of the original bill in this cause, [fol. 78] and that the costs and damages had accrued thereon as above set out, and said complainant is entitled to recover for the use and benefit of the parties in interest:

It is, therefore, ordered, adjudged and decreed that complainant do have and recover of said S. M. Nickey, W. E. Nickey, and Mrs. Orpha L. Nickey, defendants herein, jointly and severally, and the United States Fidelity & Guaranty Company, surety on the bond filed herein, the sum of $7,483.22, with interest from this date at six per cent per annum to be distributed as follows:

$646.81 for the use and benefit of the State of Mississippi; $950.00 for the use and benefit of the General County Fund of Tunica County, Mississippi; $60.64 for the use and benefit of the Highway Road Bond interest Fund of said County; $477.83 for the use and benefit of the Yazoo-Mississippi Delta Levee District, ad valorem and Brunswick Extension fund; $52.56 for the use and benefit of the Yazoo-Mississippi Delta-Levee District acreage fund; $768.10 for the use and benefit of Beat No. 2 ad valorem and bond interest fund of Tunica County, Mississippi; $3,835.00 for the use and benefit of the Lake Cormorant Drainage District fund; $2.40 for printers' fees as above set out; $3.60 for Clerks' fees as above set out; $7.50 for Sheriff's fees as above set out; $679.08 for damages as provided by law for failure to pay said taxes at the time and in the manner required by law; all of said sums with said interest thereon

to be paid to complainant herein, to be distributed as required by law.

It is further ordered, adjudged and decreed that the defendants herein and the surety on the bond above mentioned, jointly and severally, be and they are hereby taxed with all costs, taxes, damages and fees, for which execution may issue as at law.

[fol. 79] Ordered, adjudged and decreed in vacation, this 9 day of January, 1932.

R. E. Jackson, Chancellor.

This decree has been examined by us on this, January 5, 1932.

W. E. Gore, T. N. Gore, Solrs. for Defts.

[File endorsement omitted.]

[fol. 80] Summons, in usual form, showing service on Ellis Woolfolk, Jr., filed Feb. 24, 1932, omitted in printing.

[fol. 81] John W. Dulaney. James W. Bell, Jr.

Dulaney & Bell, Attorneys-at-law, Tunica, Mississippi

February 26, 1932.

Mr. L. C. Shannon, Chancery Clerk of Tunica County, Mississippi, City.

DEAR SIR:

In re State ex Rel. Attorney General vs. A. B. Nickey & Sons

We hereby waive service of citation on the complainant in the above styled cause.

Yours very truly, for the Attorney General, Dulaney & Bell, by J. W. Bell, Jr.

JWB/VCN.

Filed Feby. 27th, 1932. L. O. Shannon, Clerk.

[fol. 82] IN SUPREME COURT OF MISSISSIPPI, MARCH TERM, 1932

A. B. NICKEY & SONS

v.

GEORGE T. MITCHELL, Attorney General

STIPULATION OF REVIVOR, ETC.

It is hereby agreed by and between appellants and appellee that this cause having been instituted in the name of Rush H. Knox and having been revived in the name of George T. Mitchell, Attorney General, during his incumbency as Attorney General of the State of Mississippi, and that the term of office of George T. Mitchell having expired and Greek L. Rice having been duly elected to the office of Attorney General, and being now the duly qualified and acting Attorney General, that said cause shall be revived in the name of Greek L. Rice, Attorney General, and proceeded with in said cause instead of that of George T. Mitchell, as same appears of record.

It is further agreed that the bond attached to this agreement may be substituted for the bond sent up with the record of this cause from the chancery court of Tunica County, Mississippi, and be taken in lieu thereof, and shall be considered and have the same force and effect as if filed and approved at the time of the original bond herein.

It is further agreed that the exhibits attached to this agreement, being a copy of the assessment roll of Tunica County referred to in the record and bill filed herein, may be incorporated in the record in the Supreme Court and become a part thereof as fully as if embodied in the record sent from the chancery court of Tunica County, Mississippi to the Supreme Court of the State and certified to by the clerk of the chancery court, and may be considered by the [fol. 83] appellate court or courts in the determination of this cause of action.

Witness our signatures this the 11th day of April, 1932.

(Signed) W. E. Gore, Solicitor, Counsel for Appellants. (Signed) E. C. Sharp, Atty. for Appellee.

[fol. 84] Know all Men by these Presents:

That we, S. M. Nickey, W. E. Nickey and Mrs. Orpha L. Nickey, original defendants and principal obligors in the attachment bond filed in the cause hereinafter described, United States Fidelity & Guaranty Company, of Baltimore, Md., surety on said bond, principals, and W. E. Gore, T. N. Gore and Charlie Sorrels, sureties, are held and firmly bound unto the state of Mississippi, in the penal sum of Fifteen Thousand Dollars, the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, this January 12, 1932.

The condition of the foregoing obligation is such that, whereas, in a case lately pending in the Chancery Court of Tunica County, Mississippi, wherein Geo. T. Mitchell, Attorney General, was complainant, and S. M. Nickey, W. E. Nickey and Mrs. Orpha L. Nickey were defendants and United States Fidelity & Guaranty Company, of Baltimore, Md., was surety on an attachment bond filed therein, a decree was rendered therein in favor of the complainant and said defendants and their said surety, all conceiving themselves aggrieved thereby, have prayed for and been granted an appeal to revise and reverse said decree, returnable to the next term of our Supreme Court.

Now, therefore, if the said obligors shall pay all costs of said appeal and shall satisfy such judgment as the Supreme Court of the State of Mississippi shall render therein, this obligation shall be void; otherwise, it shall remain in full force and effect.

(Signed) W. E. Nickey, (Signed) S. M. Nickey, (Signed) Mrs. Orpha L. Nickey, by W. E. Nickey, Attorney-in-fact. United States Fidelity & Guaranty Co. of Baltimore, Md., (Signed) by Wm. M. Hall, Attorney. (Signed) W. E. Gore, (Signed) T. N. Gore, (Signed) Charlie Sorrels.

[fol. 85] The foregoing bond filed and approved by me this 9 day of April, 1932.

(Signed) L. C. Sh-nnon, Chancery Clerk of Tunica County, Miss. (Seal.)

Filed April 9, 1932. L. C. Shannon, Clerk.

(Here follows side folio 86)

[fol. 86]

EXHIBIT TO STIPULATION

Land Assessments of Tunica County, State of Mississippi, for Years 1927 and 1928

Name of owner	Description of land or division of section		Grand Total valuation	School and Road District: Road Dist. No. 2 a		Levee	Timbered lands. All lands having timber must be listed in this space: No. of acres	Valuation excluding timber and improvements	No. of thousand feet, board measure of timber	Valuation of timber thereon	Uncultivatable lands: No. of acres	Valuation excluding building and improvements and timber	Number of acres of vacant land and vacant school land not taxable
A. B. Nickey & Sons	NE¼ & NE¼ of NW¼ & S½ of NW¼ & S½ & 3 @ strip.	Sec. 2, T. 4, R. 10.	6,264	6,264	603	6,264	80	640	240,000	1,440	523	4,184	603
A. B. Nickey	All Frac. North C. W. River.	Sec. 23, T. 4, R. 10.	28,597	28,597	606	28,597	606	4,969	3,938,006	23,628	...	.....	606
A. B. Nickey & Sons	NW¼ North of Coldwater River.	Sec 24, T. 4, R. 10.	5,958	5,958	122	5,958	122	1,000	793,000	4,958	...	.....	12
A. B. Nickey & Sons	W½	Sec. 12, T. 4, R. 10.	6,824	6,824	320	6,824	320	2,624	700,000	4,200	...	.....	320
A. B. Nickey & Sons	W½	Sec. 13, T. 4, R. 10.	9,232	9,232	321	9,232	321	2,632	1,100,000	6,600	...	.....	321
A. B. Nickey & Sons	All	Sec. 14, T. 4, R. 10.	23,976	23,976	641	23,976	641	5,256	3,120,000	18,720	...	.....	641

Exhibit—Filed April 16th, 1932. Tom Q. Ellis, Clerk.

[fol. 87] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 9, 1932

Come the appellants and assign for error on the part of the trial court, the following:

1. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged notice, as shown at pages 25 and 26 of the transcript.

2. The Court erred in decil-ing to sustain the objection of the defendants to the introduction of *of* the alleged notice by the board of supervisors as to the hearing of complaints and that values had been equalized, as shown at pages 27, 28 and 29 of the transcript.

3. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged board orders, as shown at page 37 of the transcript.

4. The Court erred in admitting in evidence, over the objection of the defendants, the sheets filed herein, by agreement, as a supplement to the record, for the reason that the sheets show the assessment to have been made for years other than 1928, as shown at page 30 of the transcript.

[fol. 88] 5. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged order of the state tax commission, as shown at pages 41 to 44 of the transcript.

6. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged board order, as shown at pages 45 to 50 of the transcript.

7. The Court erred in declining to sustain the objection of the defendants to the introduction of the *the* alleged order relative to the levy of taxes for the account of Lake Cormorant Drainage District, as shown at pages 51 to 53 of the transcript.

8. The Court erred in declining to sustain the objection of the defendants to the statement of counsel as to the roll, as shown at page 55 of the transcript.

9. The Court erred in declining to sustain the objection of the defendants to the introduction of *of* the alleged

order of the state tax commission, as shown at pages 55 and 56 of the transcript.

10. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged assessment roll, as shown at pages 58, 59, 60, 127, 128 to 148 of the transcript.

11. The Court erred in declining to sustain the objection of the defendants to the introduction of the decrees of the chancery court of De Soto County, as shown at pages 62 to 74 of the transcript.

12. The Court erred in declining to sustain the objection of the defendants to the introduction of the decrees relative to the issuance of bonds of the drainage district, as shown at pages 75 to 112 of the transcript.

[fol. 89] 13. The Court erred in declining to sustain the objection of the defendants to the introduction of the testimony of the tax assessor, Veach, as shown at pages 119 and 120 of the transcript.

14. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged order of the levee board, as shown at page 125 of the transcript.

15. The Court erred in declining to sustain the objection of the defendants to the introduction of the alleged order of the board of supervisors, as shown at pages 37 to 39 of the transcript.

16. The Court erred in holding that the taxes were ever lawfully assessed or levied, either as against the land, itself, or against these defendants, personally, or that the amount thereof was ever established, or that the value of the land was ever established.

17. The Court erred in rendering and entering each and every part of the decree against the defendants and the surety on their bond.

Wherefore, the defendants, the appellants here, say that this cause should be reversed and the bill should be dismissed.

Respectfully submitted.

(Signed) W. E. Gore, (Signed) T. N. Gore, Counsel for Appellants.

I hereby certify that I have this day mailed to Mr. E. C. Sharp, one of counsel for the appelle-, at his post office address, in the city of Jackson, Mississippi, a true copy of this assignment of errors.

Witness my signature this May 6, 1932.

(Signed) W. E. Gore, of Counsel for the Appellants.

[File endorsement omitted.]

[fol. 90] IN SUPREME COURT OF MISSISSIPPI, DIVISION "B"

[Title omitted]

ORDER REMANDING CASE TO DIVISION "A"—September 26, 1932

Ordered this case remanded to the Docket before Division "A", at its first sitting in November, 1932.

[fol. 91] IN SUPREME COURT OF MISSISSIPPI

In Banc

No. 30067

S. M. NICKEY et al.

vs.

THE STATE OF MISSISSIPPI

OPINION—Filed Jan. 30, 1933

ANDERSON, J.:

The state, on the relation of the Attorney General, filed its bill in the Chancery Court of Tunica County against appellants, to recover of them the sum of $7,483.22, the aggregate of the taxes and drainage district assessments due by appellants to the state, the county of Tunica, and the latter's taxing districts, the Yazoo-Mississippi Levee District, and the Brunswick Extension, and the Lake Cormorant Drainage District, and the fees and damages in-

curred, as a result of the advertisement by the tax collector of the county of appellants' lands for sale for their payment. Appellants are non-residents of the state. The Chancery Court acquired jurisdiction by virtue of a foreign attachment which was levied on lands belonging to appellants in Tunica County. Appellants appeared and answered the bill. There was a trial on bill, answer and documentary and oral proofs, resulting in a decree in favor of the state, as prayed for. From that decree appellants prosecuted this appeal.

The taxes and assessments involved are for the year 1928. The state alleged in its bill that appellants owned certain lands in Tunica county, describing them; that these lands were duly and legally assessed for taxes for the year 1928; that the taxes, damages and costs due for 1928 were as follows: State taxes $646.81; general county taxes $950.00; highway road bond interest $66.64; Yazoo-Mississippi Levee ad valorem, and Brunswick Extension $477.83; Yazoo-Mississippi Delta acreage $52,26; Beat No. 2 ad valorem and bond interest $768.10; Lake Cormorant Drainage District $3,835.00; printer's fee $2.40; clerk's fee $2.60; sheriff's [fol. 92] fee $7.50; damages $679.08; total $7,483.22. That the lands on which the taxes were due were within the Yazoo-Mississippi Levee District and Brunswick Extension, and also the Lake Cormorant Drainage District; that none of the taxes against the lands for 1928 had been paid; that the lands against which these taxes were assessed were chiefly valuable because of their growing timber; that exclusive of the timber, they were not of sufficient value to pay said taxes; that at the time of the filing of the bill, which was on the 23rd day of July, 1929, appellants were engaged in removing the timber from the lands, which, if continued, would strip them of their value to the extent that they would be insufficient to pay said taxes, and for that reason would be knocked off to the state when sold for taxes. That in addition to the lands against which said taxes were a charge, appellant owned other lands in Tunica county, which were described in the bill.

The bill prayed that all the taxes involved be declared a debt against appellants, and decree be rendered therefor, and that all the lands described in the bill be attached to satisfy such decree. Attachment was issued, as prayed for in the bill, and levied on all the lands described therein.

Thereupon appellants gave a bond, as provided by statute, in the sum of $15,000.00, discharging the attachment. The case presents the following questions for decision:

1. Whether the lands were legally assessed for their ad valorem taxes.

2. Whether section 3122, Code of 1930, declaring every lawful tax a debt, for which action may be brought, violates the due process provisions of the state and federal constitutions.

3. Whether drainage district taxes come within the provisions of that statute.

[fol. 93] 4. Even though drainage district taxes do not come within the provisions of that statute, whether or not, under the allegations of the bill, the state had the right to subject other property of appellants to the payment of such taxes than the property against which they are assessed.

5. Whether the state has the right to recover the statutory fees, costs and damages chargeable against lands delinquent for their taxes, where they have been advertised for sale by the tax collector, but not sold.

6. Conceding that the statute includes the taxes involved, whether or not the state had the right to bring this suit before the tax collector of the county had exhausted the statutory remedies provided for the collection of such taxes.

We will consider these questions in the order stated. There is little, if any, conflict in the material evidence. The tax collector of the county, whose duty it was to collect these taxes, had advertised appellants' lands, against which they were made a charge, for sale for their payment on the first Monday in April, 1929. Shortly before the day of sale the tax collector of the county came to the conclusion that the lands would not bring a sufficient amount to pay the taxes. His representative and the attorney general conferred in reference to the matter, and decided for that reason, that the tax collector should not sell the lands for their taxes; but that the attorney general should bring this suit to recover them. Accordingly the suit was brought, the advertisement by the tax collector for sale was discontinued; and the lands, therefore, were not sold by him.

There seems to be no difficulty in determining the question whether the lands were legally assessed. The members of the Court are unanimous in reaching the conclusion that they were. The grounds urged against the validity of the assessments are not new; they have been passed [fol. 94] upon by decisions of this Court; therefore, we see no good purpose to be accomplished in another discussion of them.

Section 3122, Code of 1930, provides that every lawful tax assessed, levied or imposed by the state, or by any county, municipality or levee board, whether ad valorem, privilege, exercise, income or inheritance, shall be a debt due by the person or corporation owning the property, or carrying on the business or profession on *on* which the tax is imposed, whether properly assessed or not; and may be recovered by action, "and in all actions for the recovery of ad valorem taxes the assessment roll shall only be prima facie correct."

This statute, except some recent additions which have no bearing on the questions involved in this case, has appeared in all of our codes, including, and since, the Code of 1892. Appellants contend that the statute denies due process, because it fixes the tax as a debt, without giving the taxpayer a hearing on the debt issue. It is true, we have no statute providing for personal service of process upon the taxpayer, giving him notice and an opportunity to be heard at the meeting of the board of supervisors fixing the value of his property as the basis for taxation. But as held in George Co. Bridge Co. v. Catlett, 161 Miss. 120, 135 So. 217, the taxpayer is given his day in court on that issue by the last clause of section 3122, which provides that in an action to recover ad valorem taxes, the assessment roll shall only be prima facie correct.

In that case the Court used this language: "If the law made the assessment roll conclusive as to the amount of taxes due by the taxpayer, the appellant's position would raise a very grave question, but that is not true. The assessment roll is only prima facie correct. That means, of course, that the question of correctness is rebuttable. Therefore, when an action is brought for taxes under this statute the taxpayer is, of course, summoned into court by [fol. 95] process personally served, and there given an opportunity to be fully heard; and on the trial he will be

permitted to rebut, if he can, the prima facie correctness of the assessment roll." Citing McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335.

In Wells Fargo & Co. v. Nev., 248 U. S. 165, 63 L. Ed. 190, the Supreme Court held that it was no longer an open question that if a person against whose property a tax assessment has been made shall at any time in the course of the proceedings, before conclusive judgment be rendered, be given an opportunity to contest its correctness, he is afforded due process of law; that there is no denial of due process "in a tax assessment because the valuation was made without notice to the taxpayer, or without an opportunity to be heard, where the mode of enforcing the tax is by a judicial proceeding wherein process issues, and an opportunity is afforded for a full hearing, and only after there is a judgment sustaining the tax is payment enforced."

Notwithstanding this statute had been before this Court in several cases, its constitutionality seems not to have been challenged until the George Co. Bridge Co. case came up. See R. R. Co. v. Adams, 78 Miss. 895, 29 So. 996; Powell v. McKee, 81 Miss. 229, 32 So. 919; Delta Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190; Carrier & Co. v. Quitman Co., 156 Miss. 396, 125 So. 416; Enochs v. State, 128 Miss. 361, 91 So. 20.

The assessed value is the basis of the debt declared by the statute. It is the valuation fixed by the taxing authorities, upon which the tax levy is to be made. Before that valuation can be conclusively fixed, and become the basis of a debt for which an action may be brought, the taxpayer must have his day in court on personal service of process. The last clause of this statute furnishes such a hearing in providing that the assessment roll shall only be prima facie correct. If it is only prima facie correct, that means, of course, the taxpayer is given an opportunity to show the [fol. 96] correct valuation; and in attempting to do so, the same considerations are taken into account as would have been by the board of supervisors at its equalization meeting where the taxpayer had challenged the assessment. The fact that appellants are non-residents has no bearing on the question, because they appeared and answered the bill. They were before the court, and stood exactly like

they would, had they been residents of the state, and had been personally served with summons.

It is true that in the Delta Pine Land Company case, and in the George Co. Bridge Co. case, the taxpayers had, before suit was brought, appeared before the board of supervisors and contested their assessments. We are unable, however, to see how that, on principle, differentiates this case from those cases. In other words, in those cases the taxpayers had two hearings on the issue of the valuation of their property, and in the case at bar the taxpayer had only one hearing. Due process requires only one hearing—not two.

Section 3122 of the Code does not cover drainage district taxes; it only covers state, county, municipal and levee board taxes, "whether ad valorem, privilege, excise, income or inheritance." The state contends, however, that because of the following facts it had the right to fix the drainage taxes as a charge on the other lands owned by appellants, which were attached. Those facts were that appellants were denuding their lands in the drainage district of their timber, which constituted their principal value; that they would continue to do so until there would be nothing left except the land, which would be insufficient in value to pay the other taxes and the drainage assessment against them for 1928; that when the timber was removed appellants would permit the lands to sell to the state for state and county taxes, and there would be nothing left to pay the drainage assessments; that under the law the drain-[fol. 97] age assessments were a lien, not only against the land, but the timber standing thereon. The state's contention is that under the law the fact that appellants were destroying the timber which was part of the security for the payment of the assessments, gave it the right to resort to other property owned by appellants for the payment of the assessments, although such assessments are not debts for which a personal judgment may be recovered.

Under our drainage district statutes the assessments are a charge alone on the lands against which they are assessed. They do not constitute a debt against the landowner, and cannot be enforced as such. No other property of the landowner can be subjected to their payment. The question is whether the timber, when it is removed, is entirely freed from the assessment, regardless of what the purpose of the landowner is in removing it.

This exact question was not decided in Matthews v. Drainage District, 128 Miss. 647, 130 So. 910; but the principles there laid down, carried to their logical conclusion, can mean nothing else, except that the landowner has the absolute right to remove the timber from his lands in a drainage district, regardless of what his purpose is. The Court used this language in that case: "We hold that it was not within the legislative purpose, and therefore is not within these drainage acts, to prevent the removal of the timber at any time, and for any purpose desired by the owner; and this, too, without any payment of the installments of assessments to become due on the lands subsequently to the removal."

It would not be practical for the courts to inquire into the question as to what the purpose of the landowner was in removing the timber. As long as the timber stands, the assessments against the land are a lien on the timber, as well as on the land; but when the timber is removed it is freed from the lien, and, as stated, there can be no inquiry into whether such removal was rightful or wrongful, wise [fol. 98] or unwise. It is an absolute right. The purchasers of the bonds of these drainage districts are given notice by the drainage statutes that the dominating purpose in forming these districts is to remove a very large part, if not all, of the timber on the lands, in order to devote the lands to agricultural purposes and promote the public health. We conclude, therefore, that the state had no right to charge any other property owned by appellants outside of his lands in the drainage district, with the payment of the drainage assessments, upon the ground that a part of their security had been destroyed by appellants in the removal of the timber from the lands against which they were assessed.

Appellants gave a bond to discharge the attachment in the sum of $15,000.00. The condition of the bond is that appellants satisfy any decree which the Court might render against them. There is no merit in the contention that appellants are liable on this bond for any drainage assessments the court might find to be due by them, regardless of whether such assessments were chargeable against other lands than the lands against which they are assessed. The condition of the bond must be construed in the light of the decree sought by the state with reference to the drainage

assessments. There was no question that the drainage assessments were valid liens on the lands against which they were assessed. It was sought to charge them as liens on other lands. Under the views we have expressed, this cannot be done. Therefore, there is no liability on the bond, so far as the drainage assessments are concerned.

Appellants contend that there could be no resort to section 3122 until the tax collector had exhausted the statutory scheme of collecting. We think Delta Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190, is a complete answer to that contention. In that case the tax collector had not exhausted the statutory remedy for the collection of the taxes. It was a back assessment and suit by the state [fol. 99] revenue agent to recover the taxes. The Court held that the statute declaring taxes a debt for which suit might be brought created an additional and more effective remedy by which the nature of the tax obligation was changed to that of a debt, and applied as well to back taxes as to current taxes; that the statutory method of collecting back taxes was not exclusive—that the statute creates a new obligation to pay the taxes, as well as a new remedy for their collection, and that the word "action" in the statute does not confine the remedy to courts of law. In discussing the question whether the statutory methods for the collection of taxes had to be exhausted before action could be brought under this statute, the Court used this language:

"Nor is there anything in the proposition that the remedy provided by section 4740 should be exhausted before resort is had to the remedy provided for by section 4256. Three authorities are cited in support of this proposition, but they all apply only in the absence of statutes like section 4256. We are therefore clearly of the opinion, first, that the remedy provided by section 4740 is not exclusive of the remedy provided by section 4256, where back taxes are involved; but that either may be pursued without reference to the other; the remedy provided by section 4256 being merely cumulative and additional to that provided in section 4740".

As we view it, in order to hold that the state had no right to bring this suit, much of what was decided in that case would have to be overruled. We have not a case here

where the state has interfered with the collection of these taxes by the tax collector through the statutory scheme. It was agreed in the record that the tax collector abandoned the statutory scheme, and agreed for the state to bring this suit. The suit is the result of cooperation between the attorney general and the tax collector. It was thought by them that the taxes might be collected by this suit, but probably could not be by the tax collector. This is not a [fol. 100] case where the state has pushed the tax collector out of its way, and taken charge of the situation. It is, therefore, unnecessary to decide in this case how far the state can go in interfering with the tax collectors in the performance of their statutory duty in the collection of taxes. If the state must wait until the tax collectors have exhausted the statutory remedies for the collection of taxes, section 3122, declaring taxes a debt for which suit may be brought, would be utterly useless. To illustrate, the tax collector pursued the statutory scheme; the lands of the taxpayers are knocked off to the state for their taxes, costs and damages. The result is that the taxes are paid, and the taxpayer owes no taxes for which suit may be brought.

The chancellor, in his decree, awarded the state the costs of advertising the lands by the tax collector, and the tax collector's statutory damages for collecting delinquent taxes. We are unable to see how the state was entitled to recover these costs and damages. It is true, the lands had been advertised by the tax collectors, but they were not sold. The statutory scheme for the collection of the taxes through the tax collector was abandoned. He did not earn his commissions and costs. For those reasons it appears to us that these costs and damages were not recoverable by the state.

The result of these views is that the decree appealed from is affirmed as to all the taxes except the drainage assessments, and that part of the decree awarding the state the tax collector's costs and damages.

Reversed in part and affirmed in part.

[File endorsement omitted.]

[fol. 101] IN SUPREME COURT OF MISSISSIPPI

In Banc

Number 30067

S. M. NICKEY et al.

vs.

STATE ex Rel Attorney General

DISSENTING OPINION—Filed Jan. 30, 1933

ETHRIDGE, J.:

I am unable to agree with the majority opinion in regard to a personal liability being created by a tax assessment, and the rights of the Attorney General, on the present record, to bring suit for the ad valorem taxes due State, County and Levee Districts, etc. I think the assessment was a valid charge against the property attached, and the bond to discharge such judgments as the court might render, would be all right, if limited to subjecting the property seized to the tax assessed thereon, provided the Attorney General had authority to bring the suit.

The Attorney General's bill was against the appellants as partners, doing business under the name of "A. B. Nickey & Sons".

The defendant's answer denied the partnership, and denied knowledge or notice of any proceeding or assessment of taxes. They also set up therein that A. B. Nickey was dead at the time the alleged tax assessment was made.

There could be no judgment created by an assessment against a partnership, and the alleged assessment against "A. B. Nickey and Sons" would clearly be void as to A. B. Nickey, as he was dead.

It is a settled rule in this state that partners cannot be sued, or sue, in their partnership name, and that it is necessary in a suit by partners that the names of the individual members be alleged. Lewis v. Cline, 5 So. 112, not officially reported, and Blackwell v. Reid, 41 Miss. 102.

[fol. 102] I am of the opinion that the right to sue for taxes cannot be based on Section 3122, Code 1930, until the statutory time for collection of taxes by the Sheriff has expired, which is on the first Monday of April in each year,

and that no action by suit can be brought until after that time.

By statute, taxes constitute a lien upon all property subject to taxation, whether assessed to the true owner or not, from January 1st of each year. Therefore, the assessment of property on the assessment roll, as in the case before us, constitutes a valid assessment against the property itself, but does not constitute a valid assessment against the owners as an individual liability. In order to constitute an assessment against a person, it must be assessed to him, or them, if more than one.

A consideration of the different provisions of the revenue chapter (Chap. 61, Code 1930), will show that it was within the contemplation of the Legislature that the statutory proceedings as to the assessment of taxes and the collection thereof be followed up to the time when these authorities were given to completely act, and unless they failed to act, no suit by any officer could take the place of the tax collector in the collection of taxes.

Under Sec. 3145, Code 1930, and said section as contained in prior codes, the tax assessor is required to assess all lands in his county, and to see that none of the lands escape taxation, and that all are placed on the assessment roll so as to account for every particle of land in the county.

Section 3147 makes it the duty of the supervisors to furnish the assessor with necessary maps and plats of the county, showing all lands of the county, including the municipalities.

Section 3148 provides how the land roll shall be made up, and that when the owners are not known, the land shall be assessed to "unknown".

[fol. 103] Section 3151 provides for the description and designation of lands.

Section 3161 requires the assessor to file the rolls of assessment with the Clerk of the Board of Supervisors on or before the first Monday in July of each year, with an affidavit appended thereto that he has endeavored to ascertain and assess all the persons and property in his county; has required every tax payer to make oath as to his property, and showing the name of every person who has refused to make oath. It also provides that if the assessor fails to file his roll on or before the first Monday in July in each year, the Board of Supervisors, at its July meeting,

shall adopt an order showing such failure, and showing to the state tax Commission that the assessor has so failed, and the tax commission shall order when such roll shall be completed, and the time when such objections as may be made thereto may be heard by the Board of Supervisors.

Section 3162 provides for the equalization of such rolls by the Board of Supervisors, and shall complete same at least ten days before the August meeting, and advertise that same are ready for inspection and examination.

Section 3163 requires the assessor to attend the July meeting, and all subsequent meetings of the Board of Supervisors.

Section 3164 provides what shall be done in equalizing taxes.

Section 3165 provides how persons may object to the assessment roll.

Section 3166 provides that objections must be filed, or the assessment will stand, and that such objections must be filed at the August meeting of the Board of Supervisors, in writing.

Section 3178 makes it the duty of the Board of Supervisors to carry out the instructions from the state tax commission, and provides for a revision of its instructions.

[fol. 104] Section 3179 provides that an aggrieved tax payer may appeal to the circuit court in the manner provided by law within ten days after the adjournment of the Board of Supervisors' meeting at which the approval of the roll by the state tax commission is entered.

Section 3180 provides for the procedure of the appeal and its effect.

Section 3191 provides for changes in the assessment roll.

Section 3227 provides for the levy of taxes by the counties and taxing districts.

Section 3229 directs the tax collector to proceed to the collection of taxes, adding the county tax to the state tax, and collecting all together.

Section 3238 provides that all taxes remaining unpaid after the first day of February shall be collected by distress and sale of any personal property liable therefor, at the courthouse door unless such property be too cumbersome, after five days notice of the time and place of sale.

Section 3249 provides that the collector shall sell said land for delinquent taxes on the first Monday of April,

first offering 40 acres, and if this does not bring the amount due, then he shall offer another similar subdivision, and so on until the requisite amount be produced, or until all the land constituting one tract and assessed as the property of the same owner be offered. It also provides that if no person will bid for it the whole amount of taxes and costs, the collector shall strike the land off to the state, and that the sale shall be continued from day to day, and that any person sustaining damage by reason of failure or error of the tax collector may recover damages therefor on his official bond.

These various sections are to be construed in connection with Section 3122 giving a right to act, which section, in my [fol. 105] opinion, clearly contemplated that such right of action shall be postponed until the taxing authorities have had time to pursue the statutory scheme and collect the taxes due.

In Robertson v. Shelton, 127 Miss. 360, 90 So. 83, it was held that the Revenue Agent could not recover taxes by suit where he had taken no coercive proceeding, even after the first day of April, so long as the tax collector was still collecting taxes.

Under other decisions, when the revenue agent began a proceeding, he had the right to fees resulting from the collection of taxes, although the tax was actually collected and paid to another person than himself.

This case, Robertson v. Shelton, supra, while not directly in point, but by implication, is in accord with the view that so long as the tax collector is proceeding to collect the taxes, and so long as the period fixed by him to act, to-wit, the first Monday in April, has not expired, then no other proceeding shall be taken.

In the case of State v. Piazza, 66 Miss. 426, 6 So. 316, it was held that a statute creating a tax, and providing a special remedy for its collection, should have such remedy applied in the collection of the tax, and that this remedy is exclusive, and does not authorize suit to be brought for the tax. It was also held to be beyond the power of courts to supply by judicial construction what is omitted from the statutes. The court there said: "If the plain, simple and inexpensive statutory method of collecting taxes may be

disregarded, and the district attorney may become tax-collector at pleasure, by suit at law in one case, why may it not be done in all cases? And to what consequences would such new and dangerous principle incorporated into our system of taxation by judicial interpretation, lead? What is the limit of time within which such suits might be brought? To what statute of limitations would the state [fol. 106] be subject? How long would the citizen be left to the mercy of spies and informers, and exposed to the vexation and cost of legal proceedings in reference to a burden which is generally sufficiently onerous?"

In Adams, State Rev. Agt. v. Tonella, 70 Miss. 701, 14 So. 17, it was held that the constitutional scheme of assessing property was essential to create liability for taxes, and that the Legislature was without power to provide that the assessment should be made by another than the constitutional officer. The statute there involved gave the State Revenue Agent the power to assess taxes which had escaped taxation, and to collect all revenue improperly withheld from payment, and was, I think, as comprehensive as Section 3122, Code of 1930. It is therefore, clear to my mind that no right of action existed in the Attorney General, and that he had no authority to suspend the activities of the Sheriff in proceeding to sell, at the time fixed by law, the property, as was done in this case.

The majority opinion conveys the idea to my mind that the Attorney General acted, at the instance of the sheriff, in instituting a suit. I do not agree with this idea. What happened, according to what was dictated into the record, is as follows:

"By Mr. Dulaney (one of counsel representing the Attorney General): At the request of counsel for the defendants, I will state, as a part of the record, that a conference was held in Jackson, Miss., between Mr. Rush Knox, then Attorney General, E. C. Sharpe, Assistant Attorney General, and myself, in regard to the subject matter of this suit, sometime prior to the regular time for selling land for taxes in 1929, and at that conference it was agreed that on my return to Tunica, I would request the Tax Collector of Tunica County not to make sale of the lands described in the bill of complaint in this case for the recovery of taxes on which [fol. 107] bill is filed, and that, in accordance with that

request, no sale has been made by the Tax Collector of Tunica County, Mississippi of these lands. It is true they were advertised for sale on first Monday of April, 1929, this request was made perhaps a week or so before that date, for the taxes for which this suit is now being prosecuted."

It does not appear that Mr. Dulaney was a representative of the Tax Collector. He was, perhaps, a representative of the Board of Supervisors.

But, at all events, I think it is clear that the Attorney General was unauthorized to sue, even though the sheriff was stopped from proceeding with the tax collection. The Attorney General had no right to institute a suit where the condition was brought about by his participation and aid, which prevented the regular procedure, and, consequently is not entitled to prosecute the suit here involved, although he might have been authorized to bring suit had the sheriff, of his own accord, and without the influence of the Attorney General, failed to consummate the sale of the lands for taxes.

In my opinion, it is not permissible for the State, or any of its agents, without Legislative action, to defeat a tax payer of his right to let his lands be sold for taxes and knocked off to the state, with the right given by law to redeem should he so desire, within a two year period. And in the construction of Section 3122, this right should not be defeated. If the construction placed upon this section by the majority opinion is correct, it is my opinion that it will violate the equal protection clause of the Federal Constitution.

It appears from the record in this case that the other tax payers in Tunica County who did not pay their taxes had the benefit of Section 3249, and their property was sold to the state, subject to their right to redeem within two years. [fol. 108] In the case at bar, under the construction given, the appellants are denied this right. They have equal rights with the other taxpayers to let their land go in the regular procedure.

Under the construction given, it is within the power of the taxing authorities to select some tax payers and give them the benefit of this section, while denying it to other tax payers by instituting suit to collect the taxes rather than

allowing it to be sold in the regular order with the right to redeem in two years.

Under Section 3166, Code of 1930, and corresponding sections in prior codes, if no objection was made to the assessment roll, and no appeal taken therefrom, it became final, and the tax payer was bound thereby, and so was the state. It could not be changed except under limited conditions provided by Section 3191, Code of 1930. If the tax collector did not choose to resort to the distress method and sell the property, then both the state and the tax payer are not bound by the assessment made, because by the terms of Section 3122, the whole assessment may be opened up and either party may challenge its correctness. It is a little difficult to see how this can be done consistently in connection with the equal protection clause of the Constitution.

This suit was instituted in the chancery court, and it has often been held that the chancery court could not be made a tax assessing body. See Enochs v. State, 128 Miss. 361, 91 So. 20, and the authorities there cited.

Section 3122, Code of 1930, making taxes a debt against the owner of property, recoverable by suit, as applied to a non resident of the State is void in so far as it undertakes to impose a personal obligation as distinguished from an obligation imposed on the property for the tax. The cases of R. R. Company v. Adams, 78 Miss. 895, 29 So. 996; and George County Bridge Company v. Catlett, 161 Miss 120, 135 So. 217, and Delta Pine Land Co. v. Adams, 93 Miss. 340, 48 So. 190, in no manner refer to a non resident who had not appeared, and who had not been served with personal process within the State. In the cases of Delta Pine [fol. 109] Land Co. v. Adams, and George County Bridge Co. v. Catlett, supra, the appeals were prosecuted by the tax payers from the assessments and the assessments had been sustained and made final. All questions were presented, and the tax payers were in court prior to the assessment becoming final.

The case of Powell v. McKee, 81 Miss. 229, 32 So. 919, is not in point, because it was not a suit to recover a tax, but an injunction to restrain the collection of the tax by the taxing authorities. The remarks made in that case have no force as a decision, but are more illustrations used by the court.

In so far as these cases hold that the statute gives a right of action against a non resident who has not been served with process within the state, and who has not appeared and contested the assessment prior to its becoming final, they are not authority for the position announced in the majority opinion; which announcement is in conflict with the decisions of the Federal court, especially the case of Dewey v. Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665. The decision in that case applied to an assessment made for betterment of property, which the statute of Iowa declared to be a personal liability against the owner of the property, just as Section 3122, Code of 1930, undertakes to make the taxes there mentioned personal obligations. The court there said that:

"It is asserted in the petition that the defendant, Dillworth, the treasurer of Holt County, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. * * * In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we, therefore, express no opinion [fol. 110] upon that subject. This plaintiff was at all times a nonresident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. * * * A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken. This is as true in the case of an assessment against nonresident of such a

nature as this one as in the case of a more formal judgment. The jurisdiction to tax exists only in regard to persons and property, or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley, Tax'n (1st Ed.) pp. 3 4; Burroughs Tax'n Sec. 6."

I can see no difference between a nonresident and a resident in the imposition of a personal liability for a betterment tax, and a personal liability for an ad valorem tax. The liability, to constitute a foundation for judicial action, must exist at the time the action is instituted, and cannot be created after the filing of a suit and during its progress.

The Supreme Court of the United States has elaborately and learnedly discussed the question of distinctions be- [fol. 111] tween creating a liability against a property situated within a state, and liability against nonresidents who have not been served with process in the state, and who have not appeared. There was no appearance before the taxing authorities, and no service of process within the state in the case at bar. Consequently, what was said in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, and Dewey v. Des Moines, supra, is applicable here. In the decision of Pennoyer v. Neff, at page 570, 24 L. Ed. the court said:

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner in person, or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or when the public is a party to condemn and appropriate it for a public purpose. In other words, such service may

answer in all actions which are substantially proceedings in rem. But, where the entire object of the action is to determine the personal rights and obligations of the defendants, that is where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose."

There are numerous cases referred to in this case, and they have been followed in many cases as will appear from the case notes in 5 L. Ed. and in Rose's Notes. I will not elaborate upon them.

It follows that I believe that the judgment in the case at bar should be reversed and the bill dismissed entirely.

[File endorsement omitted.]

[fol. 412] IN SUPREME COURT OF MISSISSIPPI

In Banc

No. 30067

S. M. NICKEY et al.

vs.

STATE ex Rel. Attorney General

DISSENTING OPINION—Filed Jan. 30, 1933

GRIFFITH, J.:

In my opinion, this case does not present a proper occasion for the intervention of the attorney general and that upon the facts he was without legitimate power to institute and prosecute this suit. And such being my view, it follows that in my opinion the other questions dealt with are not before the court. I think the decree here should reverse and dismiss.

[File endorsement omitted.]

[fol. 113] IN SUPREME COURT OF MISSISSIPPI, SEPTEMBER TERM, 1932

En Banc

No. 30067

S. M. NICKEY et al.,

vs.

STATE

DECREE—January 30, 1933

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Tunica County and this court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 9th day of Januay 1932, be and the same is hereby reversed in part and affirmed in part. It is further ordered, adjudged and decreed that the decree of the Chancery Court, aforesaid, be and the same is hereby affirmed as to all the taxes except the drainage assessments, and that part of the decree awarding the state tax collector's costs and damages. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellants, S. M. Nickey, W. E. Nickey, Mrs. Orpha Nickey, jointly and severally, the United States Fidelity and Guaranty Company, and Charlie Sorrels, W. E. Gore and T. N. Gore, sureties on the supersedeas appeal bond herein the sum of $1,571.94 with interest at the rate of 6 per centum from the date of the decree in the court below until paid, to be distributed as follows: $646.81 for the use and benefit of the State of Mississippi; $950.00 for the use and benefit of the General County Fund of Tunica County, Mississippi; $60.64 for the use and benefit of [fol. 114] the Highway Road Bond Interest fund of said County; $477.83 for the use and benefit of the Yazoo-Mississippi Delta Levee District, ad valorem and Brunswick Extension fund; $52.26 for the use and benefit of the Yazoo-Mississippi Delta Levee District acreage fund; $768.10 for the use and benefit of Beat Number 2 ad valorem and bond

interest fund of Tunica County, Mississippi; all of said sums with said interest thereon to be paid appellee herein, to be distributed as provided by law. It is further ordered and adjudged and decreed that the appellee do have and recover of and from appellants and Charlie Sorrels, W. E. Gore and T. N. Gore, aforesaid sureties, all of the costs of the court below; and that the appellants do have and recover of and from the appellees all of the costs of this appeal to be taxed, etc.

[fol. 115] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR—Filed Feb. 28, 1933

Come the appellants and respectfully suggest that the Court erred in rendering its judgment of January 30, 1933, in the above styled cause, in the following particulars:

1. The Court erred in holding that the Chancery Court had any constitutional authority to assess or collect taxes and that this court had any authority to enter any judgment against the appellants in respect thereto.

2. The Court erred in construing the statute to authorize the imposition of taxes against the land on which they are alleged to have been imposed, and in holding that the trial court or the appellate court had the power to adjudicate personal liability for the payment of the taxes.

3. The Court erred in denying the appellants due process of law, in giving judgment against them without the service of process or a constitutional substitute therefor, before the assessment was made by the Board of Supervisors and the State Tax Commission.

4. The Court erred in holding that the Chancery Court had jurisdiction of the parties sufficient to support a personal judgment for the taxes on the land on which they were not paid.

[fol. 116] 5. The Court erred in holding that the appellants submitted themselves to the jurisdiction of the courts of this state, when they appeared in the Chancery Court

for relief against the condemnation and sale of the land attached, on which the taxes had been paid.

6. The Court erred in holding the lien of the tax statute to cover anything but the land which was the immediate subject of the tax imposed.

7. The Court erred in holding that the ad valorem taxes can be recovered and collected, in the face of the statute which requires the collection of these taxes and the drainage charges at the same time, which, if it were enforced in this case, would require the payment of what this Court has held cannot be recovered, in order to discharge the personal liability, if there is one.

8. The Court erred in holding that the complainants could plead the assessment and the roll as final, and recover in the face of the solemn allegation that the land was not worth what the roll disclosed as its value, on the theory that the assessment was only prima facie correct and was subject to review by the Chancery Court, with the power to do what was not done at the time the assessment was made, that is, to assess the land and value it and to determine the question of personal liability of, and impose it upon, the appellants.

9. The Court erred in holding, as a matter of fact, that the suit was the result of cooperation between the attorney general and the tax collector. The suit was brought as a result of an unwarranted interference by the attorney general with the tax collector in the discharge of his mandatory duty to sell the land for the payment of the taxes.

[fol. 117] 10. The Court erred in holding that the attorney general had any right to bring this suit so long as the matter of tax collection was in the hands of the collector.

11. The Court erred in denying the appellants the equal protection of the laws, as provided in the Fourteenth Amendment to the Federal Constitution, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws", in this, that it is the universal custom, as it is the mandatory duty of the tax collector, to sell the land of all delinquent taxpayers for taxes, upon default in their payment, and this course was pursued in Tunica County with reference to the sale

of the land of every other taxpayer in the county in the year 1928, which resulted in the payment of the debt created by the statute as to all other taxpayers. Said right to have their land so sold is a valuable right, as held by the courts of this state, and which right was denied these appellants in that they were singled out and discriminated against by the arbitrary conduct of the tax collecting authorities of said county, so that the laws of this state are one thing to one person and another to another, at the election of the tax collecting authorities, and have been administered in this case with an evil eye and an unequal hand between persons in similar circumstances, material to their rights, and constitute the denial of equal justice, within the prohibition of the Federal Constitution.

Wherefore the appellants suggest these errors and pray the Court that its judgment heretofore entered be vacated and set aside, that the decree of the Chancery Court be reversed, and that a final judgment be entered here, dismissing the bill.

Respectfully submitted.

(Signed) W. E. Gore, Counsel for Appellants.

[File endorsement omitted.]

[fol. 118] IN SUPREME COURT OF MISSISSIPPI

In Banc

Number 30067

S. M. NICKEY et al.

vs.

GREEK L. RICE, Attorney General

OPINION ON SUGGESTION OF ERROR—Filed March 20, 1933

SMITH, C. J.:

The decree of the court below was affirmed in part on a former day, and the appellants suggest that we erred in so doing.

All of the questions presented by the Suggestion of Error were decided adversely to the appellants in our former opinion, to which we adhere, and only two of them will be again specifically discussed. The appellants assert:

First. That the courts are without power to collect taxes through their judicial processes, and

Second. That a state is without power to impose a personal liability on nonresidents for taxes on property owned by them within the state.

The first of these assertions is too broadly stated, for, under all the authorities, taxes may be collected by judicial process, when, as here, so to do is authorized by the legislature. Section 3122, Code of 1930.

The second assertion presents a more difficult question and seems to be in accord with numerous State court decisions, note of Annotator to Greenbaum v. Commonwealth, Ann. Cas. 1913 D. p. 342, and to have the approval of Mr. Beale of the Harvard Law School, 32 Harvard Law Review, at page 587. The question, however, in the last analysis, is for the decision of the Supreme Court of the United States, and, according to that court, such liability can be imposed on a nonresident within the due process of law, [fol. 119] which requirements are met if, before a nonresident comes under an obligation to pay the tax, he is given appropriate notice and an opportunity to contest it. Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665; Bristol v. Washington County, 177 U. S. 133, 44 L. Ed. 701. This was expressly held in the latter case wherein the court said:

"Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665, 19 Sup. Ct. Rep. 379, cited by plaintiff in error, is not to the contrary. What was ruled there was that a citizen of one state cannot be cast in a personal judgment in another state on an assessment levied there on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

These cases were so interpreted in Parker v. Rising Sun Street Lighting Company, 229 Mass. 498, 118 N. E. 871, and Greenbaum v. Commonwealth, 147 Ky. 450, 144 S. W. 45, Ann. Cas. 1913 D, 338.

When the appellants appeared in the court below, they submitted themselves to the jurisdiction thereof, and, under the statute, had the right to contest the validity of the tax, including the assessed valuation of the property. This meets the requirements of due process. Bristol v. Washington County, supra.

Overruled.

[File endorsement omitted.]

[fol. 120] IN SUPREME COURT OF MISSISSIPPI

In Banc

No. 30067

S. M. NICKEY et al.

v.

GREEK L. RICE, Attorney General

DISSENTING OPINION ON SUGGESTION OF ERROR—Filed March 20, 1933

ETHRIDGE, J.:

I adhere to my dissent rendered heretofore, and reported in 145 So., at page 634, et seq. In this case the proceeding in the chancery court was for both an attachment of the property, and a personal judgment for the amount of taxes due thereon according to the assessment roll. The process was by publication to non-residents, but the living defendants in the bill appeared and filed an answer, challenging the assessment, and denying personal liability. The property had been seized by the attachment proceedings, and the defendants gave a bond to have the attachment released, by which they bound themselves to pay whatever taxes the court should find to be due.

The giving of this bond, of course, subjected them to a personal liability, as they secured the benefit of having the property released from attachment. However, I cannot acquiesce in the doctrine that the original assessment constituted a personal liability against the defendants, en-

forcible by suit. There was no personal service upon any of the defendants in the assessment proceedings. And while there was a demand enforcible in the courts against the property itself, there was no liability upon the owners of the property, who were non-residents, and had not been brought before the assessing board, nor had they appealed or otherwise appeared in the assessment proceedings.

[fol. 121] In my judgment, the case of Bristol v. Washington Co., 177 U. S. 133, 20 Sup. Ct. Rep. 585, 44 L. Ed. 701, does not sustain personal liability against a non-resident for taxes, and does not change the rule announced in Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665, 19 Sup. Ct. Rep. 379. In the Bristol case the property owner had localized his business, having a resident agent to transact business for him. After the death of the property owner administration proceedings were had to collect demands in favor of the estate, and to have liability against the estate adjudged, and the estate in Minnesota administered. The demand of Washington County for taxes was a liability against the property in Minnesota, and was taxable there. The administration in Minnesota had the same effect to give the court jurisdiction as though the deceased had been living, and had appeared and sought personally to transact business in court.

The case of Parker v. Rising Sun Lighting Co., 229 Mass. 498, 118 N. E. 871, cited in the majority opinion, is likewise a case where the defendant corporation had localized its business in Massachusetts, where its property was situated, and was there assessed. There is quite a difference between a citizen merely owning property in a foreign state, and being subject to a personal liability for taxes without service of personal process.

The case of Groenbaum, et al., v. Commonwealth of Ky., 147 Ky. 450, 144 S. W. 43, Ann. Cas. 1913 D, 338, is likewise distinguishable from Dewey v. Des Moines, supra. In its opinion in this case the Kentucky Court said, on page 341, Ann. Cas. *Cas.* 1919 D;

"The cases relied upon by appellant rest upon the governing fact that a non-resident is not to be liable personally where he had not appeared, in any way, in the initial proceedings taken to levy the assessment. Being a non-resident, and presumably ignorant of the steps taken by the foreign state, he has not had his day in court, and his lia-

[fol. 122] bility is therefore limited to his property there taxed; but where he takes part in the assessment, this presumption does not exist, and he stands in no better position than a resident."

In that case the Kentucky Court held that the defendant took part in the assessment of the property. In other words, that he was present during the assessment proceedings, and participated therein. The interpretation, however, placed by the Kentucky Court upon the case of Dewey v. Des Moines is contrary to the weight of authority, and, in my view, contrary to the holding in that case.

In a case note to Greenbaum v. Commonwealth, Ann. Cas. 1913 D, page 342, it is said:

"Most of the decisions on the question of the personal liability of a nonresident for taxes on resident property held contrary to the reported case and support the proposition that no action can be brought to enforce a personal liability for taxes against a nonresident. Dewey v. Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 U. S. (L. Ed.) 665; Rising v. Granger, 1 Mass. 47; Dewey v. Stratford, 42 N. H. 282; Cocheco Mfg. Co. v. Stafford, 51 N. H. 471 (dicta); Bowles v. Clough, 55 N. H. 389; Winchester v. Stockwell, 75 N. H. 322, 74 Atl. 249; New York, etc., R. Co. v. Lyon, 16 Barb. (N. Y.) 651; New York v. McLean, 57 App. Div. 601, 68 N. Y. S. 606, affirmed 170 N. Y. 374, 63 N. E. 380; New York v. Mason Au; etc., Confectionery Co., 64 Misc. 405, 119 N. Y. S. 472; Pendleton v. Com., 110 Va. 229, 65 S. E. 536; Berlin v. Grange, 5 U. C. C. P. 211. See, also, McLean v. Myers, 134 N. Y. 480, 32 N. E. 63; Cottle v. Cary, 61 App. Div. 54, 76 N. Y. S. 580, 173 N. Y. 624, 66 N. E. 1106; State v. Hodges, 14 Rich. L. (S. C.) 356."

I am, therefore, of opinion that the suggestion of error should be sustained.

[File endorsement omitted.]

[fol. 123] IN SUPREME COURT OF MISSISSIPPI

En Banc

[Title omitted]

ORDER OVERRULING SUGGESTION OF ERROR—March 20, 1933

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled, doth order and adjudge that said suggestion of error be and the same is hereby overruled, and further hearing is reserved for the purpose of considering the motion to correct the judgment entered on January 30, 1933.

[fol. 124] IN SUPREME COURT OF MISSISSIPPI

In Banc

No. 30067

S. M. NICKEY et al.

vs.

STATE OF MISSISSIPPI ex Rel. GEORGE T. MITCHELL, Attorney General

OPINION ON MOTION TO CORRECT JUDGMENT—Filed April 3, 1933

SMITH, C. J.:

The appellants have filed a motion to correct the judgment rendered herein by this court on a former day. The error, if such there is, which they desire corrected, is in the calculation and statement in the court below of the amount due by the appellants as general county taxes. This error, if such it is, was made in the court below; and if the appellants desired to complain thereof, they should have separately and particularly set it forth in their assignment of errors. Rule 6 of this Court, 101 Miss. —, p. 904. This they failed to do. The only paragraph in the assignment of errors that could in any way said to have referred

to the alleged error complained of is in this language: "The Court erred in rendering and entering each and every part of the decree against the defendants and the surety on their bond." Such an assignment of error is insufficient for any purpose. It is too late to here challenge the decree of the court below for an error not complained of when the case was under consideration by this court on its merits. By not having included it in their assignment of errors it was waived in so far as any complaint thereat is here concerned. Whether the error complained of, if such it is, can be corrected in the court below under Section 755, Code 1930, is not before us, and we express no opinion thereon.

Overruled.

[File endorsement omitted.]

[fol. 125] IN SUPREME COURT OF MISSISSIPPI

En Banc

[Title omitted]

ORDER OVERRULING MOTION TO CORRECT JUDGMENT—April 3, 1933

This cause this day came on to be heard on the Motion to Correct the judgment herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said Motion be and the same is hereby overruled.

[fol. 126] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

AGREEMENT AS TO TIME—Filed June 22, 1933

It is hereby agreed by and between Counsel for the appellants and the Appellee in the above styled cause, that Counsel for the appellants may have five days from this

date within which to file the necessary papers to perfect the appeal of said cause from the Supreme Court of the State of Mississippi to the Supreme Court of the United States, and that no point will be made by the appellee of the failure of the appellants to perfect said appeal within the time required by the Laws of the United States to perfect said appeal.

Witness our signatures this June 20, 1933.

W. E. Gore, Counsel for Appellants. Greek L. Rice, Attorney General of the State of Mississippi, by E. C. Sharp, Counsel for Appellee.

[File endorsement omitted.]

[fol. 127] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL—Filed June 22, 1933

To the Honorable Sydney Smith, Chief Justice of the State of Mississippi:

Come the petitioners, S. M. Nickey, W. E. Nickey and Mrs. Orpha L. Nickey, principal appellants, United States Fidelity & Guaranty Company of Baltimore, Maryland, surety on the bond releasing the attachment of the Chancery Court of Tunica County, Mississippi, and Charlie Sorrels, W. E. Gore and T. N. Gore, sureties on the appeal bond to the Supreme Court of the State of Mississippi, who feel aggrieved by the judgments rendered in the above styled cause, on January 30, 1933, March 20, 1933, and April 3, 1933, and do hereby pray an appeal from said judgments to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herewith, and the appellants pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgments were rendered, authenticated according to law, be sent to the Supreme Court of the United States under the law and rules in such cases made and provided; and your petitioners further pray that the

proper order relating to the required security and granting an appeal, with supersedeas, be made therefor.

And, as in duty bound, your petitioners will ever pray.

W. E. Gore, Geo. Butler, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 128] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 22, 1933

Come S. M. Nickey, W. E. Nickey, residents of the State of Tennessee, and Mrs. O. L. Nickey, a resident of the State of California, who were sued as A. B. Nickey and Sons, in the Chancery Court of Tunica County, Mississippi, and United States Fidelity & Guaranty Company, surety on the bond filed in said court to dissolve an attachment, and Charlie Sorrels, W. E. Gore, and T. N. Gore, sureties on the bond for appeal from the decree of said Chancery Court to the Supreme Court of the State of Mississippi, the appellants herein, and assign the following errors:

1. The Supreme Court of the State of Mississippi, by its construction of Section 4256, Code of Mississippi of 1906, Section 6887, Hemingways Code of Mississippi of 1917, Section 8189, Hemingways Code of Mississippi of 1927, and by its judgments deprived the principal appellants herein of certain tracts of land, located in the State of Mississippi, the property of said principal appellants, on which the taxes were paid, in violation of and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in this, that said court held that said land could be attached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, who are non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon [fol. 129] said other land of said non-resident appellants were assessed, if assessed at all, without any summons,

notice or appearance of said non-resident appellants, at any time prior to or during the assessment proceedings, and in this, the Supreme Court of the State of Mississippi held that said assessment proceedings constituted, not only a valid assessment of said land in rem, but that said proceedings had the legal and practical effect of imposing a personal liability upon and constituted a judgment against said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of the State of Mississippi, whose duty it was to make a tax assessment against said other land, and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, extraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, which had the effect of enforcing said statute in contravention of the due process of law clause of said Constitution and of depriving said non-resident appellants of their property which was attached, without due process of law.

2. The State of Mississippi does not possess the power to impose personal liability, by its statutes, upon non-residents of the State of Mississippi, for taxes assessed against lands located in said state and owned by such non-residents.

3. Said non-resident principal appellants were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of said state, in violation of, and contrary to, Section 2, Article IV and the Fourteenth Amendment of the Constitu-
[fol. 130] tion of the United States, in this, that under the statutes of said State of Mississippi, all property assessed for taxes is required to be sold at public auction, to the highest bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability, which course is universally pursued in said state and was pursued with reference to all other taxpayers in said state and in Tunica County, Mississippi, for the same year and

under the same assessment, but that the tax collector of said county refused so to sell the land of these non-resident appellants, under the direction of the Attorney General of said State, and in lieu of such sale, this suit was maintained, as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property, although the property of all other taxpayers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, in violation of the statutes of said state and the aforesaid provisions of the Constitution of the United States, which action on the part of said taxing authorities and the Attorney General of the State of Mississippi, the Supreme Court of the State of Mississsippi held not to be violative of said constitutional rights of these appellants, who are, one a resident of the State of California and the other two residents of the State of Tennessee.

4. Although Section 4256, Code of 1906, Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi of 1927, prescribes only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment, notwithstanding the fact, [fols. 131-141] that it makes no provisions of the means whereby personal jurisdiction of the property owners can be obtained and notwithstanding no such jurisdiction of the principal appellants was obtained prior to or during the proceedings looking to the alleged assessment of said taxes, in that said court held that the due process of law requirement of the Fourteenth Amendment of the Constitution of the United States was met by affording the principal appellants a hearing in the Chancery Court in which the action was commenced, and notwithstanding it is settled by the long and continuous and now effective course of the decisions of that court, that the chancery courts of said state have not the power to value or assess property or to levy or to collect taxes in said state, which holding that the principal appellants were personally liable for said taxes

had the practical, necessary and legal effect to make the assessment a conclusive judgment, imposing personal liability for the payment of said taxes, without affording the principal appellants an opportunity to be heard on the questions of the value of the land and of personal liability for said taxes and without having such jurisdiction of the persons of said principal appellants as would, as a matter of law, support and lawfully warrant the imposition of a personal judgment against them, when said taxes were said to have been assessed, all of which is contrary to, and in violation of, the provisions of said Fourteenth Amendment, in that it deprived the principal appellants of their property without due process of law.

5. For other grounds which are apparent.

Wherefore the appellants pray that the judgments herein rendered in the Supreme Court of the State of Mississippi be reversed and that proceedings be had in accordance with the mandate of the Constitution of the United States.

W. E. Gore, Geo. Butler, Attorneys for Appellants.

[File endorsement omitted.]

[fols. 142 & 143] Bond on appeal for $5,000, approved and filed June 22, 1933, omitted in printing.

[fol. 144] IN SUPREME COURT OF MISSISSIPPI

No. 30067

S. M. NICKEY et al.

vs.

GREEK L. RICE, Attorney General

ORDER GRANTING APPEAL—Filed June 22, 1933

This day came on to be considered the petition of S. M. Nickey, W. E. Nickey and Mrs. Orpha L. Nickey, and United States Fidelity & Guaranty Company of Baltimore,

Maryland, surety on the bond releasing the attachement issued out of the Chancery Court of Tunica County, Mississippi, and Charlie Sorrels, W. E. Gore and T. N. Gore, sureties on the appeal bond to the Supreme Court of the State of Mississippi, who feel aggrieved by the judgments rendered by the above styled cause in this Court on January 30, 1933, March 20, 1933 and April 3, 1933, and the Chief Justice of the Supreme Court of the State of Mississippi, having considered said petition and having reached the conclusion that said appeal ought to be granted:

It is, therefore, ordered that an appeal be, and it is, hereby granted in said cause to the Supreme Court of the United States, to be held in the City of Washington, D. C., from the judgments heretofore filed and entered herein on January 30, 1933, March 20, 1933, and April 3, 1933, with supersedeas, and that a certified transcript of the record and all proceedings in said cause be forthwith submitted to the said Supreme Court of the United States, and to be further ordered that the appeal bond, with supersedeas, be fixed at the sum of $5,000, which bond has been filed and is hereby approved and a supersedeas and stay of execution of all other proceedings is hereby granted.

Ordered and adjudged this June 22nd, 1933.

Sydney Smith, Chief Justice Supreme Court of Mississippi.

[File endorsement omitted.]

[fols. 145 & 146] Citation, in usual form, showing service on Greek L. Rice, filed June 23, 1933, omitted in printing.

[fol. 147] In Supreme Court of Mississippi

[Title omitted]

Præcipe for Transcript of Record—Filed June 22, 1933

To the Honorable Tom Q. Ellis, Clerk:

The appellants, S. M. Nickey, Mrs. Orpha L. Nickey, and W. E. Nickey, and the surety on bond releasing the attachment, United States Fidelity & Guaranty Company of Baltimore, Maryland, and the sureties on the appeal bond,

Charlie Sorrels, W. E. Gore, T. N. Gore and United States Fidelity & Guaranty Company of Baltimore, Maryland, having perfected their appeal, you will please, in making your record, include the following:

1. Original Bill and Exhibits.

2. Writ of attachement.

3. Bond releasing attachment.

4. Answer. Eliminate last paragraph and insert, without caption, amendment found pages 159 to 162, inclusive of Record, with

5. Evidence: Begin with page 25 of record, insert through paragraph ending "Main Highway", page 46; insert paragraph page 47, "A tax of 3.12%—issued in 1910"; then begin on page 48 "A tax of 75% of the State tax" to end next paragraph ending "when they become due". Then begin on page 50, "A tax of 21.87%, to end of that page. Insert pages 54-56, inclusive. Omit pages 57-112, inclusive. Insert pages 113-122, inclusive. Omit page 123; copy 124-126, inclusive. Omit pages 127-148, inclusive. Copy pages 149-158, inclusive; omit pages 159-162, inclusive. Insert pages 163 and 164; omit pages 165-171, inclusive.

6. Insert Stipulation of revivor and the appeal bond attached, being bond including United States Fidelity & Guaranty Company as surety.

7. Decree, pages 172-176, inclusive.

Omit Notice to Stenographer and appeal bond, 177-178.

[fol. 148] 8. Insert waiver, page 179, and summons, page 180.

9. Assignment of Errors and all orders and judgments entered in your Court, including all opinions of the Supreme Court of Mississippi, and the Judges thereof.

10. The appellate proceedings herein.

W. E. Gore, Geo. Butler, Counsel for Appellants.

[File endorsement omitted.]

[fol. 149] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 150] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed July 31, 1933

In accordance with paragraph 9 Rule 13, of this Honorable Court, appellants file with the Clerk of this Court a definite statement of the points on which they intend to rely and of the parts of the record which they think necessary for the consideration thereof, with proof of service of the same on the adverse party, to-wit:

Statement of the Points on Which Appellants Intend to Rely

1

Section 4256, Mississippi Code of 1906 (Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi of 1927) which provides:

"Taxes a debt recoverable by action.—Every lawful tax levied or imposed by the state, or by a county, city, town, village, or levee board, is a debt due by the person or corporation owning the property or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recoverable by action; and in all actions for the recovery of taxes the assessment roll shall only be prima facie correct."

as construed by the Supreme Court of the State of Mississippi, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of property without due proces of law, in this, that the Supreme Court of the State of Mississippi held that a certain tract of land owned by the principal appellants located in the State of Mississippi on which the taxes had been paid could be at-
[fol. 151] tached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached, as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon said other lands of said non-

resident appellants were assessed, if at all, without any summons, notice or appearances of said non-resident appellants, at any time prior to or during the assessment proceedings; and in this, the Supreme Court of the State of Mississippi held that said assessment proceedings constituted not only a valid assessment of said lands in rem, but that the proceedings had the legal and practical effect of imposing a personal liability upon, and constituted a judgment against, said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of the State of Mississippi, whose duty it was to make a tax assessment against said other lands; and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, extraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, and in this, that the Supreme Court of the State of Mississippi held that the State of Mississippi possesses the power to impose personal liability by its statutes upon non-residents of the State of Mississippi for taxes assessed against land located in said State and owned by such non-residents, without providing for notice to or affording opportunity to such non-residents to be heard as to the validity of said assessments.

2

That the Supreme Court of the State of Mississippi, by its judgment and opinion, denies the non-resident principal appellants the privileges and immunities possessed and accorded the citizens of the State of Mississippi by its laws [fol. 152] and the equal protection of the laws of said State, in violation of, and contrary to, Section 2, Article IV, of the Constitution of the United States, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the Fourteenth Amendment of the Constitution of the United States, in this, and under Chapter 199, Laws of 1908, and Section 4326, of the Mississippi Code of 1906 (Sections 6960 and 6962, Hemingway's Code of 1917, Sections 8245 and 8247, Hemingway's Code of 1927) all property assessed for taxes

is required to be sold to the highest and best bidder, for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi, for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability for such taxes, which course is universally pursued in said State, and was pursued with reference to all other property in said State and in Tunica County, Mississippi, for the same year and under the same assessment as the property of the non-resident appellants was had, but that the tax collector of said County refused so to sell the land of the non-residenf appellants, under the direction of the Attorney General of the State, and in lieu of such sale this suit was maintained as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property, although the property of all other tax payers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, and the Supreme Court of the State of Mississippi held such proceedings not to be violative of the Constitutional provisions above mentioned and the rights of the non-resident appellants.

That while Section 4256, Code of 1906 (Section 6887, Hemingway's Code of 1917, Section 8189, Hemingway's Code of 1927) purported to prescribe only a rule of evi- [fol. 153] dence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment and as imposing personal liability against a non-resident citizen, although said statute makes no provision of the means whereby personal jurisdiction of the property owner can be obtained prior to or during the proceedings looking to the alleged assessment, in that said Court held that the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States may be met by affording a non-resident property owner a hearing in the Chancery Court in which the action to collect the personal liability was commenced, notwithstanding it is settled by the long and continuous

and now effective course of the decisions of that court that the chancery courts of said State have no power to value or assess property or to levy or collect taxes in said State, which holding that the principal appellants were personally liable for said taxes had the practical, necessary and legal effect to make the assessment a conclusive judgment, imposing personal liability for the payment of said taxes, without affording them an opportunity to be heard on the question of the intrinsic value of the land, and as related to the assessment of other lands in the county, and without having such jurisdiction of the person of said principal appellants as would, as a matter of law, support and lawfully warrant a personal judgment against, when said taxes were said to have been assessed, are contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and thereby deprived the principal appellants of their psoperty, without due process of law.

The Following are the Parts of the Record Which the Appellants Think are Necessary for the Consideration of the Points above Mentioned, and Which are hereby Designated to be printed by the Clerk of This Court, viz:

The entire record as certified by the Clerk of the Supreme Court of the State of Mississippi, except all duplications, repetition of titles, etc., as contemplated by para-
[fols. 154 & 155] graph 9, Rule 13, of the Supreme Court of the United States, need not be printed.

This the 27th day of July, 1933.

W. E. Gore, Geo. Butler, Counsel for Appellants.

Jackson, Mississippi, July 27th, 1933.

I, Greek L. Rice, Attorney General of the State of Mississippi, and Attorney of Record for the appellee in the above entitled cause, do hereby acknowledge service of the foregoing statement of points on which the appellants intend to rely and the parts of the record which they think necessary for the consideration thereof.

Greek L. Rice, Attorney General, State of Mississippi, by —— ——.

[fol. 156] [File endorsement omitted.]

Endorsed on cover: File No. 37,901. Mississippi Supreme Court. Term No. 208. S. M. Nickey, W. E. Nickey, Mrs. Orpha L. Nickey, et al., appellants, vs. The State of Mississippi. Filed July 31, 1933. File No. 298, O. T., 1933.

(4182)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 298

S. M. NICKEY ET AL., APPELLANTS,

vs.

THE STATE OF MISSISSIPPI.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF JURISDICTION.

Appellants submit, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, and amended June 1, 1931, and May 31, 1932, the following statement of the basis of the jurisdiction of the Supreme Court of the United States to review, on appeal, the judgments of the Supreme Court of the State of Mississippi, made on January 30, 1933, March 20, 1933, and April 3, 1933.

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (*a*) Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, being Section 344, U. S. Code, Ann. Title 28.

B.

The statutes of the State of Mississippi the validity of which is involved follow:

1. Section 4256, Code of Mississippi of 1906, page 1162; 6887, Hemingway's Code of 1917, Vol. II, page 2822; 8189, Hemingway's Code of 1927, Vol. II, page 3238.

2. Section 4326, Code of 1906, page 1182; 6960, Hemingway's Code of 1917, Vol. II, page 2855; 8245, Hemingway's Code of 1927, Vol. II, page 3265.

3. Section 6962, Hemingway's Code, 1917, Vol. II, page 2865; 8247, Hemingway's Code, 1927, Vol. II, page 3266.

The statute scheduled as No. 1, *supra*, reads as follows:

> "8189 (6887). Taxes a Debt Recoverable by Action. Every lawful tax levied or imposed by the state, or by a county, city, town, village, or levee board, is a debt due by the person or corporation owning the property or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recovered by action; and in all actions for the recovery of taxes the assessment roll shall only be prima facie correct."

The statute scheduled as No. 2, *supra*, reads as follows:

> "8245 (6960). Sale of Land for Taxes—Advertisement. After the fifteenth day of January the tax

collector shall advertise all lands in his county on which the taxes have not been paid, or which is liable to sale for other taxes, for sale at the door of the courthouse of the county on the first Monday of April following; such advertisement shall be inserted for three weeks in some newspaper published in the county, if there be one, but in counties having two court districts the land shall be advertised and sold in the district in which such lands are situated, and be put up at the courthouse door, and shall contain a list of the lands to be sold in numerical order as they are contained in the assessment roll, in substance as follows: * * *."

The statute scheduled as No. 3, *supra,* reads as follows:

"8247 (6962). How Sale Made.—On the first Monday of April, if the taxes remain unpaid, the collector shall proceed to sell the land, or so much and such parts of the land, of each delinquent taxpayer, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. He shall first offer forty acres, and if the first parcel so offered do not produce the amount due, then he shall offer another until all the land constituting one tract and assessed as the property of the same owner be offered. The sale shall be continued from day to day within the hours for sheriff's sales until completed; but neither a failure to advertise nor error in the advertisement, nor error in conducting the sale, shall invalidate a sale at the proper time and place for taxes, of any land on which the taxes were due and not paid; but a sale made at the wrong time or at the wrong place shall be void. And any person sustaining damage by reason of any failure or error of the tax collector may recover damages therefor on his official bond."

C.

The judgments of the Supreme Court of the State of Mississippi, reversing in part and affirming in part the de-

cree of the Chancery Court of Tunica County, Mississippi, from which judgments of affirmance this appeal is prosecuted, were entered January 30, 1933, March 20, 1933, and April 3, 1933 (R. 113, 123, 125).

The petition for appeal was presented and allowed on June 21, 1933 (R. 127, 144).

D.

Nature of the Case and Ruling of the Supreme Court of Mississippi.

S. M. Nickey and W. E. Nickey were and are residents of the State of Tennessee and Mrs. Orpha L. Nickey was and is a resident of the State of California. They are the principal appellants herein and will be referred to as the appellants, in this statement.

The appellants were the owners of two tracts of land in Tunica County, Mississippi, upon which taxes were assessed and levied for the year 1928, by a proceeding in rem, without actual notice of the assessment proceedings, without being summoned to appear prior to or during said proceedings and without appearing or otherwise submitting themselves to the jurisdiction of the authorities charged with the duty of assessing land in that county and State. The appellants paid the taxes for the year 1928, which were assessed and levied against one of the tracts of land owned by them, but did not pay the taxes assessed and levied against the other tract of land. The land on which the taxes were not paid was advertised for sale by the tax collector of Tunica County, in accordance with the provisions of Section 4326 Code of 1906, 6960 Code of 1917, 8245 Code of 1927, but, before the date of sale the Attorney General of the State of Mississippi directed the tax collector of Tunica County not to make the sale of the land and thereafter brought an action in the Chancery Court of Tunica

County, by attachment which was levied upon the tract of land upon which the taxes had been paid for the year 1928 by the appellants. In this action, the Attorney General rested the bill on Section 4256 Code of 1906, 6887 Code of 1917, 8189 Code of 1927, and pleaded the land assessment roll of Tunica County as a judgment imposing personal liability upon the appellants for the payment of the amount of the taxes on the tract of land, which were not paid. The bill prayed that the tract of land upon which the taxes were paid be subjected to the payment of the taxes levied against the land on which the taxes were not paid, on the theory that the assessment roll constituted a personal judgment against the appellants, for the unpaid taxes.

The appellants answered the bill and set up, among other defenses, that they had no actual notice, were not served with any personal process and did not otherwise appear or submit themselves to the jurisdiction of the assessing authorities, prior to or during the assessment proceedings, and for that reason the assessment proceedings, as a judgment in personam was void, that the State of Mississippi did not possess the power to impose personal liability, by its statutes, upon non-residents of the State of Mississippi, for taxes assessed against lands located in said State and owned by such non-residents, that the appellants were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of said State, a violation of and contrary to Section Two, Article Four, and the Fourteenth Amendment of the Constitution of the United States, in that, under the statutes of said State, all property assessed for taxes is required to be sold at public auction to the highest bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State for the full amount of all taxes, costs

and damages incident to making the sale, which sale operated, under the laws of said State, as full payment of the State's demand for taxes, and that this course is universally pursued in said State and was pursued with reference to all other taxpayers in said State and in Tunica County, Mississippi, for the same year and under the same assessment, but that under the direction of the Attorney General, the tax collector refused so to sell the land of these appellants upon which the taxes were not paid, and instead of so making such sale, filed this action, which course of conduct resulted in the unlawful selection of these apellants by said authorities and unlawfully discriminated against them and deprived them of the benefit of the discharge of their liability for said taxes, by a sale of their property upon which the taxes were unpaid, although the property of all other taxpayers was so sold and the liability of other taxpayers thereby discharged, and that this discrimination against these appellants was contrary to and in violation of the statutes of said State and the aforesaid provisions of the Constitution of the United States.

The action was defended on the additional ground, that Section 4256, Code of 1906, 6887, Code of 1917, 8189, Code of 1927, makes no provision of the means whereby personal jurisdiction of any property owner can be obtained, that no such jurisdiction was obtained, and that, inasmuch as the Chancery Court has uniformally been held to be without the power to value, assess or levy taxes against property, that statute, construed as imposing personal liability for the payment of taxes, violates the Constitution of the United States, in that so enforced, it would deprive and did deprive the appellants of their property without due process of law.

While the appellants attacked the validity of the assessment of the land upon which the taxes were not paid, even

as an assessment *in rem*, the Supreme Court of the State of Mississippi held the assessment to be valid, which forecloses any consideration of that question in the Supreme Court of the United States.

The complaint of the appellants as to depriving them of their property without due process of law refers to the tract of land upon which they paid the taxes and which land was attached for the satisfaction of the taxes alleged to be due against the land on which the taxes were not paid. There was no complaint, in the court below, and there is no complaint in this Court, that this proceeding which is asserted to have deprived the appellants of their property without due process of law, relates in any way to the tract of land upon which the taxes were not paid. Since the Supreme Court of the State of Mississippi has decided the assessment against the land on which the taxes were not paid was valid, as an assessment *in rem*, it must be conceded that no question can be raised with reference to the loss of that property, as depriving the appellants of it without due process of law.

The appellants contended and now contend, that, inasmuch as Section 4255, Code of 1906, page 1162, Section 6886, Hemingway's Code of 1917, Vol. II, page 2822, limits the lien of the tax assessment to the particular property which constitutes the immediate subject of assessment, there is no means by which the alleged debt may be satisfied out of the property on which the taxes were paid, except to go through the personal liability of the appellants, as a medium, and that since the action of the assessing authorities did not constitute a judgment imposing personal liability, the tract of land on which the taxes were paid cannot be subjected to the payment of the demand.

Section 4255, Code of 1906, page 1162, Section 6886, Hemingway's Code of 1917, Vol. II, page 2822, reads as follows:

"6886 (4255). Taxes a lien, from what date.—Taxes, both State and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, incumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the State, or any county, city, town, or village, or subdivision of either."

The Supreme Court of the State of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, that to subject the land upon which the taxes were paid to the satisfaction of the demand for the taxes assessed and levied against the land, which were not paid, without notice, summons, appearance or otherwise submitting to the jurisdiction of the assessing authorities, prior to or during the assessment proceedings, so as to warrant the imposition of personal liability, was to deprive the appellants of their property, the land upon which the taxes were paid, without due process of law.

Some of the authorities which the appellants believe sustain this claim are:

Dewey v. *Des Moines,* 173 U. S. 193, 43 Law. Ed. 665.

Pennoyer v. *Neff,* 95 U. S. 714.

Mexican Central Railway Company v. *Pinkney,* 149 U. S. 194.

McCulloch v. *Maryland,* 4 Wheat. 316, 4 Law. Ed. 579.
Cleveland, Painesville, Ashtabula Railroad Company v. *Commonwealth of Pennsylvania,* 15 Wall. 300, 21 Law. Ed. 186.
Cooley on Taxation, Vol. I (Fourth Edition), pages 220, 221 and 223.
State Tax on Foreign-Held Bonds, 15 Wall., 300, 21 Law. Ed. 179.
Pendleton v. *Virginia,* 65 S. E. 536.
Winchester v. *Stockwell,* 74 Atl. 249.

The Supreme Court of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, to the effect that the State of Mississippi does not possess the power to impose personal liability, by its statutes, upon non-resident property owners of the State, for taxes assessed against lands located in said State and owned by such non-residents.

Some of the authorities which the appellants conceive to sustain their claim are:

New York v. *McLean,* 57 N. Y. App. Div. 601, 68 N. Y. Sup. 606, 63 N. E. 380.
Maltbie's Case, 199 N. E. 389.

The Supreme Court of the State of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, that they were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of the State, in violation of the Constitution of the United States, in that they were selected out and made the victims of a wilful discrimination and denied a substantial right, to have their land which was the subject of assessment of taxes here involved, for the purpose of liquidating whatever debt may

have been imposed by the statute upon which the action is based, as was done with reference to all other taxpayers of the State of Mississippi in like circumstances. The cases upon which the appellants rely to sustain this claim are:

Yick Wo v. *Hopkins,* 118 U. S. 356, 374, 30 Law Ed. 220 to 228.
Henderson v. *Mayor of New York,* 92 U. S. 259.
Chy Lung v. *Freeman,* 92 U. S. 275, *Ex Parte Virginia,* 100 U. S. 339.
Neal v. *Delaware,* 103 U. S. 370.
Soon Hing v. *Crowley,* 113 U. S. 703.

According to the decisions of the Supreme Court of the State of Mississippi, the right to have the land against which the taxes here involved were assessed sold for the purpose of liquidating this debt, is a valuable and substantial right.

The case which supports this contention is:

Yazoo Delta Mortgage Company v. *Lumbley,* 116 So. 95, 149 Miss. 864, at page 872.

The Supreme Court of the State of Mississippi has held that the sale of land which is the immediate subject of taxation operates as a discharge of the debt imposed by the section of the Code under which this action is prosecuted.

The cases which support this contention are:

Carrier Lumber & Manufacturing Company v. *Quitman County,* 156 Miss. 396, at page 401.
McLaren v. *Moore,* 60 Miss., at page 382.

The Supreme Court of the State of Mississippi ruled against and denied the claim of the appellants, to the effect that, so to construe the statute on which this suit is based as to make the roll conclusive as a personal judgment, notwithstanding it makes no provision of the means whereby

personal jurisdiction of the property owners can be obtained and notwithstanding no such jurisdiction of these appellants was obtained prior to or during the proceedings looking to the alleged assessment of taxes demanded, and held that the due process of law requirement of the Fourteenth Amendment of the Constitution of the United States was met by affording the appellants a hearing in the Chancery Court in which the action was commenced, in the face of the settled, continuous and unreversed course of the decisions of that court, that the chancery courts of said State have no power to value or assess property or to levy or collect taxes, which holding of said court had the necessary and legal effect to make the assessment roll a conclusive judgment, imposing personal liability for the payment of said taxes, without affording the appellants an opportunity to be heard on the question of personal liability and the value of the land.

The authorities on which the appellants rely to support their claim, that the chancery court hearing on these questions is no hearing at all, which has the effect of making the assessment roll a conclusive judgment, are:

State v. *Tonella*, 70 Miss. 701, at pages 709 to 714.

Brooks v. *Shelton*, 47 Miss. 243, at page 247.

Ex Parte Wimberly, 57 Miss. 437, at page 447.

Railroad Company v. *Adams*, 73 Miss. 648, at pages 659 to 662.

Thompson v. *Kreutzer*, 103 Miss. 388.

Johnson v. *Puffer Manufacturing Company*, 111 Miss. 240, at pages 242 and 243.

Mississippi Railroad Commission v. *Western Union Telegraph Company*, 107 Miss., page 442, at page 452.

Griffith's Chancery Practice, Section 441, page 466.

Preston v. *Sturgis Milling Company*, 183 Fed. 1.

The authorities on which the appellants rely to sustain their claim, that taxes constitute a lien on no other property than that which is the immediate subject of assessment are:

Anderson v. *State*, 23 Miss. 459, at page 475.
Bailey v. *Fuqua*, 24 Miss. 497, at page 499.
Cooley on Taxation, Vol. IV (Fourth Edition), Sections 1230, 1235.

Respectfully submitted,

GEO. BUTLER,
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Counsel for Appellants.

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No. 298

In the Supreme Court of the United States

OCTOBER TERM, 1933

S. M. NICKEY, W. E. NICKEY, MRS. ORPHA L. NICKEY, ET AL, Appellants

vs.

STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W. E. GORE,
GEO. BUTLER,
Attorneys for Appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, W. E. NICKEY, MRS. ORPHA L. NICKEY, ET AL, Appellants

vs.

STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This case is here on appeal, Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat., 937, being Section 344, U. S. Code, Ann., Title 28, to review the judgments of the Supreme Court of the State of Mississippi, rendered January 30, 1933, R., 72, March 20, 1933, R., 80, and April 3, 1933, R., 81, based upon the opinions of the majority of the Court, as written by Justice Anderson, R., 53, and Chief Justice Smith, R., 75 and 80. The case has not yet appeared in the official reports. It is reported in 145 So., 630, 146 So., 859, and 147 So., 324. The dissenting opinion of Justice Griffith appears at page 638

145 So., and in the printed record, at page 71. The dissenting opinions of Justice Ethridge appear at page 634, 145 So., and page 859, 146 So., and at pages 62 and 77, of the printed record.

QUESTIONS INVOLVED

The questions involved are:

1. Whether Section 4256, Code of Mississippi of 1906, page 1162; 6887, Hemingway's Code of 1917, Vol. II, page 2882; 8189 Hemingway's Code of 1927, Vol. II, page 3238, confers, in view of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, jurisdiction on the taxing authorities of the State of Mississippi to impose personal liability upon non-residents of the state, for the payment of taxes assessed and levied on lands owned by such non-residents, where such non-residents were not personally served with process and did not otherwise appear or submit themselves to the jurisdiction of the authorities empowered, and charged with the duty, to make tax assessments, prior to, or at any stage of, the assessment proceedings?

2. Whether, conceding that the State of Mississippi possesses this power, that section of the Code, as construed by the Supreme Court of Mississippi, violates that clause of the Constitution of the United States, in that, it provides no means by which jurisdiction of such land owners may be obtained, so as to require them to appear during the assessment proceedings, but thereafter such non-resident landowners may be subjected to

suit and compelled to respond, although no jurisdiction was obtained until after the proceedings became final, and other land of such non-residents may be sold to satisfy the demand of the state for such taxes, without depriving them of their property in the land attached and sought to be sold, without due process of law?

3. Whether, by resorting to the state court to obtain relief from the imposition of such personal liability and the attachment of the other property of such non-residents, through the medium of such personal liability said to be imposed by the statute, the appellants thereby in any manner consented, or rendered themselves liable to a judgment against them for any personal liability which may be satisfied by a sale of their other property in said state?

4. Whether the attorney general of the state and the tax collector of Tunica County, by agreement, can single out, and discriminate against, the appellants by refusing to sell their delinquent tax land to pay their alleged debt, and sue them by attachment of land on which they had paid all taxes and sell it for taxes assessed against their delinquent tax land, when all such land of all other taxpayers in the state and in Tunica County are sold each year, and were sold in the same year, by the tax collectors of the counties, which sale paid the debts of all others so situated, without violating Section 2, Article IV, and the Fourteenth Amendment of the Federal Constitution, guaranteeing to the citizens of each state all privileges and immunities of the citizens of the several states, and forbidding any

state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or to deny to any person within its jurisdiction the equal protection of the laws, in view of the provisions of Section 4326, Code of 1906, pages 1182, 8245 Hemingway's Code 1927, Vol II, page 3265, and Section 6962, Hemingway's Code 1917, Vol. II, pages 2865, 8247, Hemingway's Code 1927, Vol. II, page 3266, which prescribe the manner in which land shall be sold for the delinquent taxes thereon and make it the mandatory duty of the tax collector of the county to sell the land of delinquent taxpayers, or so much or such parts thereof, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash, when tax sales under those statutes are held by the State Supreme Court to have the legal effect to discharge the owner from liability for the payment of the delinquent taxes due against the property, and when that Court holds that the right to have such land so sold is a valuable and substantial property right of such a taxpayer?

5. Whether, under Section 2255, Code 1906, page 1162, 6886, Code 1917, Vol. II, page 2822, which provides that "all taxes assessed shall be a lien upon and bind the property assessed" the land attached can be sold to pay the taxes on the other land, except by establishing personal liability as the means by which it may be taken?

Copies of the four sections of the Code to which reference is made are printed in an appendix to this brief.

The majority decision of the Supreme Court of Mississippi held that the first named statute could, and did confer jurisdiction on the taxing authorities of Mississippi to impose personal liability upon such non-residents of the state; that said statute did not violate the Constitution of the United States and did not deprive the appellants of their property without due process of law; that, by resorting to the state court to obtain relief from the imposition of such personal liability, the non-resident appellants thereby consented and rendered themselves liable to a judgment against them for a personal liability which the statute was held to impose and that such liability could be satisfied by sale of their other property in the state, and that there was no discrimination against them or denial or abridgment of the privileges and immunities of the citizens of the several States or of the citizens of the United States and no denial of the equal protection of the laws to these appellants.

The majority decision held that the defendants were personally liable for the taxes assessed without notice and that the attached lands could be sold, but bond having been given to release the attachment, judgment was rendered against the appellants and their sureties, instead of adjudging that the land be sold to pay the debt.

In the Syllabus of the case, 145 So., 630, which, in Mississippi is prepared by the court and states the law of the case, it is said: "Statute making a tax a debt due by taxpayer for which action may be brought held

not invalid as depriving taxpayer of property without due process of law (Code 1930, Sec. 3122; Const. U. S. Amend. 14; Const. Miss. 1890, Sec. 14).

"Code 1930, Sec. 3122, providing that every lawful tax assessed 'shall be a debt due by the' taxpayer, whether properly assessed or not, and authorizing recovery thereof by action, does not violate due process clause of both State and Federal Constitution, in view of further provision that in all actions for recovery of ad valorem taxes, the assessment roll shall only be prima facia correct, which furnishes the taxpayer with an opportunity for hearing to contest the validity of the tax.

"Non-resident defendants who appeared and answered bill of complaint (and sought relief from the attachment for taxes imposed without notice, and from the assessment thereof, as imposing personal liability) were before court, same as residents, and same as if they had been personally served with summons. (Matter in parentheses supplied).

"Proceedings by tax collector of county, exhausting statutory remedies provided for collection of taxes held not condition precedent to action by state to collect taxes as debt against taxpayer (Code 1930, Sec. 3122)."

In the Syllabus of the case, 146 So., 859, it is said: "Taxes may be collected by judicial process when authorized by Legislature (Code 1930, Sec. 3122).

"Personal liability against non-resident for taxes meets due process requirements if, before obligated to pay tax, non-resident has been given appropriate notice and opportunity to contest tax (Code 1930, Sec. 3122).

"Where non-residents appeared in state's action for collection of taxes as debt, and submitted to jurisdiction, and had opportunity for hearing, requirements of due process were met (Code 1930, Sec. 3122."

STATEMENT OF THE CASE

This is an attachment in chancery, under Code of Mississippi in 1930, Section 173, which vests jurisdiction in the chancery court of attachment suits founded upon any debt, against any non-resident who owns land within the state. It was filed by the state in the chancery court of Tunica County, on the relation of the Attorney General.

The bill averred that the defendants were non-residents of Mississippi. A. B. Nickey was dead at the time the taxes were said to have been assessed. None of the living defendants, the appellants here, or A. B. Nickey, was, or ever had been, a resident of Mississippi. S. M. Nickey and W. E. Nickey were residents of Tennessee and Mrs. Orpha L. Nickey was a resident of California.

The bill demanded unpaid taxes for 1928 on the land described at the bottom of page 1, of the printed record. The action is based on Section 8189, Code of 1927, which appears in the Appendix. The section makes taxes a debt and provides that they may be recovered

as such, by action. As a means to satisfy the alleged personal liability of the non-residents, the land described at page 3 of the printed record was attached. The taxes on that land were paid. Both tracts were owned by the defendants.

The complainant pleaded the assessment roll as a judgment imposing personal liability on the defendants. The taxes were alleged to have been a debt due by the defendants, to the state, county, levee and drainage districts. R., 2 and 3. The assessment roll upon which the bill is based appears at page 50a of the printed record. The advertisement of the sale of the lands, by the tax collector appears at page 5 of the printed record. This position of the complainant is stated in the bill, and there is a further statement of the position of the complainant at page 29 of the record, to the effect that the complainant did not claim that the assessment roll constituted a personal judgment, that when the appellants owned and operated the land, they took it with full knowledge of the laws of Mississippi, relating to their right to be heard, when equalization took place and were charged with knowledge of the law which gave them the right to be heard at specified times. The second contention, as there stated, is, that, even though they were ignorant of the law, the complainant would not attempt to enforce the assessment as a personal judgment, but that this suit was brought so as to give the appellants their day in court.

Although the assessment roll was pleaded as a conclusive judgment, this position was abandoned by the

complainant and it thereafter relied on its right to fix the liability, which involved valuation, assessment, equalization and levy of taxes by the proceeding in the chancery court. Therefore, the suit was brought on a cause of action which did not exist at the time it was filed. The Supreme Court did not hold that the personal liability was imposed when the assessment and levy were made, but held that the due process of law requirement of the Fourteenth Amendment was met in affording the appellants an opportunity to be heard on the questions of value and assessment, and equalization as related to other property in the county and state, at the trial in the chancery court.

The amount demanded of the defendants and the sureties on the bond releasing the attachment, in the chancery court, was $7483.22, and was composed of drainage district charges $3835, costs and damages $692.58, and the balance state, county and levee district taxes, R., 4, 7, and 46. The Supreme Court reversed the decree as to the drainage taxes, costs and damages, and entered judgment for the other taxes demanded.

The complainant alleged that the land on which the taxes were not paid was chiefly valuable on account of the timber, and that the value of the land, exclusive of the timber, was not sufficient to pay the taxes then due. R., 2. The bill prayed an injunction against cutting the timber on both tracts of land, so as to preserve the means by which the demand could be satisfied.

The assessed value of the land on which the taxes were not paid, excluding the value of the timber, was

$21305. R., 50a. The attention of this court is invited at this time, to the fact, that the bill must stand on the allegation, that land of a value of $21305 is insufficient to liquidate a debt of $2975.54, for the State Supreme Court held that the costs, damages and drainage district taxes could not be recovered in this action and that the defendants had the absolute right to cut the timber, even though none of the taxes had been paid. The statute makes the assessment roll prima facie correct, on which the complainant might have rested the case but for the allegation of the bill, to the effect, that the land was not worth $2975.54, which was a percentage of the base, $80851, including the assessed value of both the land and timber; R., 50a, when the value of the land excluding the timber, was fixed by the roll at $21305, nearly ten times the taxes which the complainant was entitled to recover, as held by the State Supreme Court. It is submitted, possibly out of order, that the defendants were not required to go forward with proof of value and whether legal equalization in relation to the property of other taxpayers had been made. So, whatever advantage the roll afforded was lost by the complainant, and the case was submitted without any proof whatever, of value or equalization.

In respect to the questions now before this Court, the defenses were:

1. That the defendants in the chancery court were not personally summoned to appear in the assessment proceedings, that they had no legal notice, and made no appearance at any stage thereof, and that they did not otherwise submit themselves to the jurisdiction of the assessing authorities, so as to render valid a personal judgment, and that the rendition of any personal decree in the chancery court, against them would constitute taking the property attached without due process of law, in violation of the constitutions of the state and of the United States. R., 9 and 10.

2. That the legislature was without power to enact, and the state without power to enforce, a statute permitting a personal judgment to be taken against a non-resident of the state, without personal service of process, commanding his appearance during the assessment proceedings, and that, inasmuch as the assessment did not constitute a personal judgment, the levy was void. R., 10 and 11.

3. The defendants denied that their property was of insufficient value to satisfy the demand, or that the state or its sub-divisions would suffer irreparable loss or that any tax for which they were liable personally was unpaid. R., 12, Par. 12, 13, 14 and 16.

4. The defendants denied that the land was chiefly valuable for its timber. R., 12, Par. 15.

5. That the complainant had no right to attach or sell the land described at page 3 of the printed record, to collect the taxes on the land described at page 1 of the printed record. R., 12 and 13, Par. 17.

6. That for the attorney general and tax collector to single out the defendants and refuse to sell their land as the means to pay the taxes, when the land of all others was sold for taxes and their liability discharged thereby, constituted a discrimination against the defendants, in violation of the Constitution of the United States.

7. The appellants did not plead that the chancery court had no power to assess, or equalize the value of the property of appellants, in relation to the value of other property in the county and state, or to pass on the intrinsic value thereof, but defended the suit on this ground in the chancery court, when counsel made the announcement shown at page 29 of the printed record, that "We are bringing them in here now to give them their day in Court." This statement of the complainant is not based on any averment of the bill. On the contrary, it is inconsistent, and in direct conflict with the averment of the bill, R., 2 and 3, that the assessment roll imposed personal liability on the appellants.

The defense was vigorously urged on appeal to the State Supreme Court.

The validity of the assessment was challenged as an assessment in rem, also, by the defendants, but the

State Supreme Court has settled this question against the appellants.

The complainant set up, as an excuse for the oppressive conduct of, and collusion between, the attorney general and the county tax collector, in discriminating against the appellants here, by refusing to sell the delinquent tax lands to pay the debt, that they were the only lands from which the merchantable timber had been removed between the date of the assessment and the date set for the tax sale. The State Supreme Court held that the drainage charges, and the costs and damages could not be recovered at all and that the appellants had an absolute right to remove the timber. Therefore, this discrimination stands without any justification or excuse whatever.

SPECIFICATION OF ERRORS ASSIGNED AND TO BE URGED.

The errors assigned and intended to be urged are:

1. The Supreme Court of the State of Mississippi, by its construction of Section 4256, Code of Mississippi of 1906, Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi, of 1927, and by its judgments deprived the principal appellants herein of certain tracts of land, located in the State of Mississippi, the property of said principal appellants, on which the taxes were paid, in violation of and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in this, that said court held that said land could be at-

tached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, who are non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon said other land of said non-resident appellants were assessed, if assessed at all, without any summons, notice or appearance of said non-resident appellants, at any time prior to or during the assessment proceedings, and in this, the Supreme Court of Mississippi held that said assessment proceedings constituted, not only a valid assessment of said land in rem, but that said proceedings had the legal and practical effect of imposing a personal liability upon and constituted a judgment against said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of Mississippi, whose duty it was to make a tax assessment against said other land, and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, estraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, which had the effect of enforcing said statute in contravention of the due process of law clause of said Constitution and of depriving said non-resident appellants of their property which was attached without due process of law.

2. The State of Mississippi does not possess the power to impose personal liability, by its statutes, upon non-residents of the State of Mississippi, for taxes assessed against lands located in said state and owned by such non-residents.

3. Said non-resident principal appellants were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of said state, in violation of, and contrary to, Section 2, Article IV and the Fourteenth Amendment of the Constitution of the United States, in this, that under the statutes of said State of Mississippi, all property assessed for taxes is required to be sold at public auction, to the highest bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability, which course is universally pursued in said state and was pursued with reference to all other taxpayers in said state and in Tunica County, Mississippi, for the same year and under the same assessment, but that the tax collector of said county refused so to sell the land of these non-resident appellants, under the direction of the Attorney General of said State, and in lieu of such sale, this suit was maintained, as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property, although

the property of all other taxpayers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, in violation of the statutes of said state and the aforesaid provisions of the Constitution of the United States, which action on the part of said taxing authorities and the Attorney General of the State of Mississippi, the Supreme Court of the State of Mississippi held not to be violative of said constitutional rights of these appellants, who are, one a resident of the State of California and the other two residents of the State of Tennessee.

4. Although Section 4256, Code of 1906, Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi of 1927, prescribes only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment, notwithstanding the fact that it makes no provisions of the means whereby personal jurisdiction of the property owners can be obtained and notwithstanding no such jurisdiction of the principal appellants was obtained prior to or during the proceedings looking to the alleged assessment of said taxes, in that said court held that the due process of law requirement of the Fourteenth Amendment of the Constitution of the United States was met by affording the principal appellants a hearing in the Chancery Court in which the action was commenced, and notwithstanding it is settled by the long and continuous and now effective course of the decisions

of that court, that the chancery courts of said state have not the power to value or assess property or to levy or to collect taxes in said state, which holding that the principal appellants were personally liable for said taxes had the practical, necessary and legal effect to make the assessment roll a conclusive judgment, imposing personal liability for the payment of said taxes, without affording the principal appellants an opportunity to be heard on the questions of the value of the land and of personal liability for said taxes and without having such jurisdiction of the persons of said principal appellants as would, as a matter of law, support and lawfully warrant the imposition of a personal judgment upon them, when said taxes were said to have been assessed, all of which is contrary to, and in violation of, the provisions of said Fourteenth Amendment in that it deprived the principal appellants of their property without due process of law.

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY.

1. Section 4256, Code of 1906, Section 6887, Code of 1917, Section 8189, declaring taxes to be a debt, as construed by the Supreme Court of the State of Mississippi, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in this, that the Supreme Court of Mississippi held that a certain tract of land owned by the principal appellants located in the State of Mississippi on which the taxes

had been paid could be attached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached, as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon said other lands of said non-resident appellants were assessed, if at all, without any summons, notice or appearance of said non-resident appellants, at any time prior to or during the assessment proceedings; and in this the Supreme Court of Mississippi held that said assessment proceedings constituted not only a valid assessment of said land in rem, but that the proceedings had the legal and practical effect of imposing a personal liability upon, and constituted a judgment against, said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of the State of Mississippi, whose duty it was to make a tax assessment against said other land; and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, extraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, and in this, that the Supreme Court of the State of Mississippi held that the State of Mississippi possesses the power to impose personal liability by it statutes upon non-residents of the State of Mississippi for taxes assessed

against land located in said state and owned by such non-residents, without providing for notice to or affording opportunity to such non-residents to be heard as to the validity of said assessments.

2. That the Supreme Court of the State of Mississippi, by its judgment and opinion, denies the non-resident principal appellants the privileges and immunities possessed and accorded to the citizens of the State of Mississippi by its laws and the equal protection of the laws of said state, in violation of, and contrary to, Section 2, Article IV, of the Constitution of the United States, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the Fourteenth Amendment of the Constitution of the United States; in this, that under Chapter 199, Laws of 1908, and Section 4326, of the Mississippi Code of 1906 (Sections 6960 and 6962, Hemingway's Code of 1917, Sections 8245 and 8247, Hemingway's Code of 1927) all property assessed for taxes is required to be sold to the highest and best bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi, for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability for such taxes, which course is universally pursued in said state, and was pursued with reference to all other property in said state and in Tunica County, Mississippi, for the same year and under the same assessment as the property of the non-resident appellants was had, but that the tax collector of said county refused so to sell

the land of the non-resident appellants, under the direction of the Attorney General of the State, and in lieu of such sale this suit was maintained as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property of all other taxpayers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, and the Supreme Court of the State of Mississippi held such proceedings not to be violative of the Constitutional provisions above mentioned and the rights of the non-resident appellants.

That while Section 4256, Code of 1906 (Section 6887 Hemingway's Code of 1917, Section 8189, Hemingway's Code of 1927) purported to prescribe only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment and as imposing personal liability upon a non-resident citizen, although said statute makes no provision of the means whereby personal jurisdiction of the property owner can be obtained prior to or during the proceedings looking to the alleged assessment, in that said Court held that the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States may be met by affording a non-resident property owner a hearing in the chancery court in which the action to collect the personal liability was commenced, notwithstanding it is

settled by the long and continuous and now effective course of the decisions of that court that the chancery courts of said state have no power to value or assess property or to levy or collect taxes in said state, which holding that the principal appellants were personally liable for said taxes had the practical, necessary and legal effect to make the assessment a conclusive judgment, imposing personal liability for the payment of said taxes, without affording them an opportunity to be heard on the question of the intrinsic value of the land, and as related to the assessment of other lands in the county, and without having such jurisdiction of the person of said principal appellants as would, as a matter of law, support and lawfully warrant the imposition of a personal judgment, when said taxes were said to have been assessed, are contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and thereby deprived the principal appellants of their property, without due process of law.

ARGUMENT.

One of the attributes of sovereignty is the power to tax; and, although the jurisdiction to exercise that power extends to all persons and property within the bounds of the sovereign and correctly is said to be coterminous with the bounds of the jurisdiction, the power to tax either persons or property beyond the bounds does not exist.

McCulloch vs. Maryland, 4 Wheat, 316.

Cleveland, Painsville & Ashtabula Railroad Company vs. Commonwealth of Pennsylvania, 15 Wall., 300, 21 Law Ed., 186.

The boundary line is the line of sovereignty. Boundary means sovereignty, since in modern times sovereignty is mainly territorial.

Central Railroad vs. New Jersey, 209 U. S., 473 affirming S. C. 70 N. J. L., 81, 56 Atl., 239.

Harvard Law Review, Vol. 32, No. 6, p. 587.

The taxing power of the state cannot reach over into any other jurisdiction to seize upon persons for purposes of taxation.

New York vs. McLean, 63 N. E., 380;

Augusta vs. Kimball, 92 Me., 605, 40 Atl., 666;

State Tax on Foreign Held Bonds, 15 Wall., 300.

No personal obligation can be imposed upon a non-resident to pay a tax levied upon property within the teritorial jurisdiction of the state. The collection of the tax may be enforced by the proceeding in rem, against the property which is the subject of assessment.

Maltby's Case, 199 N. E., 389; *New York vs. McLean,* 57 N. Y., App. Div., 601, 68 N. Y. Supp, 606, 63 N. E., 380; *Pennoyer vs. Neff,* 95 U. S., 714, and cases there cited; *Mexican Central Ry. Co. vs. Pinkney,* 149 U. S., 194, 209.

In *New York vs. McLean*, supra, it is held that, even if a statute were intended to confer upon the officers of the state authority to maintain an action against a nonresident and to impose upon him a personal liability for the payment of the tax assessed, so far as it attempted to confer that power, it was beyond the power of the Legislature to enact, and to that extent invalid.

In *Dewey vs. Des Moines*, 173 U. S., 193, 43 Law. Ed., 665, this Court held that a state statute authorizing an assessment to be levied upon property for local improvement, and imposing upon the lot owner, who is a nonresident of the state, personal liability to pay such assessment, is a statute which the state has no power to enact, as to enforce such personal liability would be a taking of property without due process of law and a violation of the Federal Constitution. In that case, the Court said:

> "In this proceeding of the lot owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid, the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous, but it was so far erroneous as to

constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned."

The chancery court entered a personal decree against the defendants in that court, who occupied the same position as the plaintiff in the Dewey case, and ordered a general execution on the bond releasing the attachment. The State Supreme Court affirmed the decree of the chancery court in this respect.

The character of the tax demanded in the Dewey case was not the governing factor, but the decision turns on the question, whether the assessing authority had jurisdiction of the person at the time assessment was made, the same as in the case of a more formal judgment.

In *Winchester vs. Stockwell*, 74 Atl., 249, the Court held that, though the Dewey case was decided with reference to a betterment tax, the case is equally applicable to any other tax against a nonresident.

The leading case on the point that a nonresident cannot be subjected to the jurisdiction of a court if he is not actually found within the territory, is *Buchanan vs. Rucker*, 9 East, 192. In that case the action was assumpsit on a foreign judgment of an Island Court of Tobago. The record of the judgment showed that upon the filing of the declaration the court ordered a summons to the defendant to appear which was served by nailing a copy of the declaration on the court house door, as in the case at bar, the summons was by publi-

cation. The defendant in the Rucker case had never been on the island nor did he appear by attorney. It was shown that this mode of summoning absentees was warranted by law of the island and was actually practiced there. The English Court refused to recognize the validity of the judgment; and Lord Ellenborough said: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" Jurisdiction of Courts Over Foreigners, Harvard Law Review, Vol. XXVI, No. 4, page 286.

The same rule prevails, as it must, in Mississippi. In *Columbia Star Milling Company vs. Brand*, 115 Miss., 625, 76 So. 557, it was held that no personal judgment can be rendered against a foreign corporation upon publication of process. In *Boutwell vs. Grayson*, 118 Miss., 80, 79 So., 61, it was held that no valid judgment without valid service of process or an appearance or waiver of process can be rendered. See, also, *Delta Insurance and Realty Agent vs. Fourth National Bank*, 137 Miss., 855, 102 So., 846.

The statutes of Mississippi do not authorize the assessment of nonresidents of the State of Mississippi. Section 8191, Hemingway's Code of 1927, 6891, Hemingway's Code 1917, 4358, Code 1906 provides that, "Every person shall be assessed in the county and in the municipality in which he resides at the time of the assessment." Residence in the state is a prerequisite to a valid assessment of any person, under this statute, and it follows, as night the day, that a nonresi-

dent cannot be assessed at all, so as to impose personal liability. Jurisdiction to tax is limited to an assessment in rem.

In *Adams vs. Colonial & United States Mortgage Company,* 82 Miss., 263, 392, 34 So., 482, the Supreme Court of Mississippi said: "Wherever the money of lender in one state is by the principal entrusted to the control of an agent in another state for the purpose of being deposited in the latter state, and loaned out, collected and re-loaned or habitually kept on deposit, for safety merely, * * so as thus to remain, through a course of dealing so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquired what is known as a business situs for the purpose of taxation."

Thus, it will be seen, that, both by statute and judicial decision, the law of Mississippi is that it has no power to assess either persons or property which are outside of its territorial boundaries. Whether this is a matter of choice or constitutional limitation can make no difference.

In *Union Refrigerator Transit Company vs. Kentucky,* 199 U. S., 194, it was argued that, since the laws of that state protected the corporation, it being domestic, as a consideration for such protection, that state was entitled to tax all of its personal property because it was a creature of the laws of the state. This court held this contention to be based on the out-worn maxim, mobilia sequuntur personam, and did not deem the principle suggested as worthy of direct discussion. The gist

of Justice Brown's argument was, that the power of taxation is based upon the assumption of an equivalent rendered to the taxpayer; and that taxation of property without such an equivalent is a taking of property without due process of law. There can be no possible distinction between the right to tax property which is outside the territorial jurisdiction and the right to tax persons who are outside the territorial jurisdiction.

In Cooley on Taxation, Vol. I, Fourth Edition, Section 94, it is said that a tax on property and rights wholly beyond the confines of the state constitute a taking thereof without due process of law. *Looney vs. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, 38 Sup. Ct. 85; *Metropolitan Life Ins. Co. vs. New Orleans*, 205 U. S. 395, 51 L. Ed. 853, 27 Sup. Ct. 499; *Delaware, L. & W. R. Co. vs. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. 669; and *Louisville U. J. Ferry Co. vs. Kentucky*, 188 U. S. 385, 47 L. Ed. 513, 23 Sup. Ct. 463, are cited to support the text.

In *International Paper Company vs. Massachusetts*, 246 U. S., 135, 141, 62 Law. Ed., 624, 38 Sup. Ct., 292, Ann. Cas. 1918 C, 617, it is said, that the due process clause precludes a state from taxing property belonging to a foreign corporation which is neither located nor used within the boundary of the state.

In Cooley's Taxation, supra, it is said: "Likewise, state taxation of 'persons' over which the state has no jurisdiction is a deprivation of property without due process of law, where they are made personally liable for the tax".

Section 478, Code of Iowa, 1873, provides that charges for local improvements shall be payable by the owner of the property abutting the street improved and may be collected and the lien enforced by a proceeding at law or in equity, and that it shall be sufficient to declare generally for work and labor done, and materials furnished, against all the owners of the property or any of them, and that such charges, when assessed, shall be payable by the owner personally. The claim against the plaintiff, in Dewey's Case, supra, was based on that statute. The statute involved in the case at bar provides no means to summon the land owner. There is no distinction between a statute which provides a means by which the property owner may be summoned and his liability fixed, but the means is not made use of, and one which provides no such means but which lays down only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, as does the Mississippi statute. If it is conceded, that this rule of evidence can be enlarged by judicial amendment of a legislative act, so as to constitute it a means by which the land owner is afforded a hearing amounting to due process, as was done by the State Supreme Court, the fact remains, that the hearing was not given the appellant at the time the assessment was made. Therefore, the cases are exactly alike and this case must be ruled against the state, as was Dewey's Case against the City of Des Moines and the contractor.

The defendants in the chancery court, the appellants here, did not in any manner consent or render themselves liable to a judgment there, imposing person-

al liability which may be satisfied by a sale of their other Mississippi property on which they had paid all taxes, by appearing in the chancery court and seeking relief from the alleged personal liability and from the attachment. This question is foreclosed in Dewey's Case, supra, in which this Court said:

> "By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counter-claim made by the defendant contractor give any such authority".

The principle, that property shall not be taken without due process of law, is not varied, because of any difference in the location of property. In Dewey's Case, supra, it did not appear, where his other property was located, if indeed, there was any effort to take it. This rule is not subject to the exception, that property located in other states may not be taken, but that property located in the same state may be sold to satisfy a personal liability which does not exist. All property, wherever located, is protected from confiscation, in the absence of proceedings which amount to due process of law.

In *State Revenue Agent vs. Tonella*, 70 Miss., 701, at page 715, in discussing the question, whether a taxpayer could be subjected to suit before the tax is due by him, which involves making a legal assessment, said:

"But the question is not whether the assessment is conclusive against the citizen when the suit is brought but it is whether he may be subjected to a suit at all unless a tax is due by him at the time, and whether a tax is ever due until an assessment (is) duly made in conformity to the Constitution. Either what the agent does before suit is brought is an assessment of the property, fixing liability for its taxes, which liability is the foundation and support of the suit at law or there is no assessment at all preceding the suit, and the anomaly is presented of an action on a non-existing cause of action, with power in the plaintiff to create, pending the action, the right of action on which the suit rests.

"We are not certain that we appreciate the precise position of counsel. The assumption runs throughout their briefs that a person owning property which has not been assessed is a delinquent who cannot complain of any legislation having for its purpose the taxation of the property. Counsel do not expressly declare that such persons are not entitled to the protection of the constitution, but they suggest that, having failed to obey the law by giving in their property for taxation when all other property was assessed, such delinquent should be left to be dealt with at the discretion of the legislature. But the fact that such persons may have violated the law, either by neglecting or wilfully refusing to return their property for taxation, is no reason why constitutional safeguards, provided for the protection of all classes, should be destroyed

or ignored. The question is not one of policy, but of power; and, if it is competent for the legislature to dispense with an assessment of property as to one class, it would be equally within its power to dispense with it for any or all other classes."

The position finally taken by the Attorney General was to admit that no personal liability was imposed when the assessment was made. The State Supreme Court followed the Attorney General in this view, and held that these property owners could be sued on a cause of action which did not exist and that they must suffer the loss of their property in such a case or have imposed upon them a personal liability which answered the same purpose. Thus, the practical effect of the holding of the State Supreme Court is to take the attached property in the face of the bald proposition that such a taking rests on a non-existent liability.

Section 2255, Code of 1906, 6886, Code 1917, which provides that all taxes assessed shall be a lien upon and bind the property assessed, limits the lien, in this case to the land upon which these taxes were said to have been assessed. This is recognized in the bill, for the complainant undertook to go through the personal liability as a means to reach the lands upon which the taxes were paid, by attaching them and demanding that they be sold to satisfy this liability.

That taxes constitute a lien on no other property than that which is the immediate subject of assessment, has been held by the State Supreme Court in *Anderson vs. State*, 23 Miss., 459, at page 475, and *Bailey vs. Fu-*

qua, 54 Miss., 497, at page 499. See also, Cooley on Taxation, Vol. IV, (Fourth Edition) Sections 1230 and 1235.

Section 4326, Code of 1906, 8245, Hemingway's Code 1927, and Section 6962, Hemingway's Code of 1917, 8247, Hemingway's Code of 1927, which prescribes the manner in which land shall be sold for the delinquent taxes thereon, and make it the mandatory duty of the tax collector of the county to sell the land of delinquent taxpayers, or so much or such parts thereof as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. The attorney general entered into an agreement with the tax collector, R., 38, whereby the tax collector refused to perform his mandatory duty in the face of the fact that it is the universal custom in the State of Mississippi to make sales of land on which default in the payment of taxes has been made on the first Monday in April of the year after assessment of taxes, and that on the first Monday of April 1929 all such lands were sold and those of every other taxpayer in Tunica County were so sold, which sale resulted in discharging personal liability of every other taxpayer in the State of Mississippi, if any such liability existed. The excuse given for this discrimination against the appellants here, was that their lands were the only lands in Tunica County, delinquent for taxes, from which the merchantable timber had been removed between the date of the assessment and the date set for the tax sale. A sufficient answer to this is, that the appellants had the absolute right to remove the timber from their lands in a drain-

age district, regardless of what their purpose was, as was said in the opinion of Justice Anderson, R., 59. An honest misconception of the law on the part of the attorney general and tax collector can furnish no ground for discrimination.

In *Carrier Lumber & Manufacturing Company vs. Quitman County*, 156 Miss., 396, 124 So., 437, 125 So., 416, the Supreme Court of Mississippi held, that a sale of land for taxes discharged the personal liability of the owner, and that thereafter there was no personal debt on which an action could rest. It follows, therefore, that if this duty had been discharged and these appellants had been given the benefit of the sale, the debt would have been paid. It appears, therefore, that the policy of the law of Mississippi is to stop at confiscation of the property against which taxes are assessed.

In *Yazoo Delta Mortgage Company vs. Lumbley*, 116 So., 95, 149 Miss., 864, at page 872 of the state report the Supreme Court held that Section 6103, Hemingway's Code 1927 is an important statute designed to protect both the state and the land owner, and that, if a sale for less than the amount of taxes, damages and costs can be made, it would be highly prejudicial to the owner, for the reason that the lands might be put up and sold for a mere fraction of the taxes due, leaving a personal debt due by him to the

state, which could be collected by judgment and execution, as a debt due by the taxpayer to the state under Section 4256, Code of 1906, Hemingway's Code 1927, Section 8189, under which the present action was brought by the attorney general.

Section 6103, supra, reads as follows: "If, upon offering the land of any delinquent taxpayer, constituting one tract, no person will bid for it the whole amount of the taxes and all costs, the collector shall strike off the same to the state, and he shall, on or before the first Monday of May thereafter, transmit to the land commissioner a certified list of the lands struck off by him to the state, specifying the day of sale and the amount of taxes for which the sale was made, and each item of cost incident thereto, and the land commissioner shall correct the list, if necessary, by the records of his office and of the United States Land Office, and strike from it land improperly on it, and return it to the collector for correction, if necessary, and the collector shall correct it as instructed by the land commissioner and return it to him as corrected.

> "And when the list is corrected it shall be recorded in the land commissioner's office and shall then be certified by the land commissioner and be transmitted to the clerk of the chancery court of the county, and be by him recorded in a book kept for that purpose."

If the land of a delinquent taxpayer is purchased by an individual, of course, the debt is paid. If no

such sale can be made, the statute makes the state a purchaser at the same price, and with the same result.

In *Yick Wo vs. Hopkins,* 118 U. S. 356, 374, 30 Law. Ed., 220-228, this Court held that it was not obliged to reason from the probable to the actual and pass upon the validity of an ordinance, as tried merely by the opportunities which the terms afford, of unequal and unjust discrimination in their administration; that the cases then under consideration presented the ordinances in actual operation, and the facts shown established an administration directed so exclusively against Chinese as to warrant and require the conclusion that whatever may have been the intent of the ordinances, they were applied by the public authorities charged with the administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to all persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United Sates; and that, though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authorities with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

It is submitted, that no clearer case of unconstitutional discrimination can be conceived than is pre-

sented by the conduct of the attorney general and the county tax collector against these taxpayers.

The extent of the power of the chancery court of Tunica County was to determine judicially, the questions, whether the tax assessment was lawfully made, whether proper value had been set, whether the value had been equalized in relation to the property of other taxpayers, whether a proper levy had been made, and also whether personal liability for the payment of the taxes had been imposed, all of which acts must have been performed by the county tax collector and the board of supervisors of the county.

In *Colbert vs. State*, 86 Miss., 769, it is said that under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function, indeed the supreme legislative prerogative, indispensable to the integrity of the legislature and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberty of the people.

In *Adams, Revenue Agent, vs. Tonella*, 14 So., 14, 70 Miss., 701, at page 716, it is said: "It is not too much to say that, if it were possible for one man to perform the duties of the office of revenue agent according to the provisions of the code, there are not enough courts in all states to determine in a life-time the suits which would be brought in one year. But it is obvious that no purpose is disclosed of preserving the rule of uniformity and equality prescribed by the

constitution. The evident purpose is to vest power in the agent to sue in the most flagrant instances of undervaluation of property heretofore taxed, or of non-assessment. Each case stands separate and distinct from each other, and, in lieu of the local agencies provided by the constitution, with local tribunals for equalization of values, the scheme of the act is to vest unlimited power and discretion in a state officer, with a trial by jury in each suit to finally settle the question of valuation. This is a total departure from the scheme of the constitution, and it is therefore invalid."

In that case the State Supreme Court held that assessment for taxation can be made only by the officer designated by law, and where the Constitution devolves the duty of assessing upon a certain officer, the Legislature cannot substitute another; that the Constitution of 1890, Section 112, in requiring that taxation shall be uniform and equal and that assessment for taxation shall be under general laws and by uniform rules, according to value, contemplates that such assessment shall be made by the assessor provided for by Section 138 thereof, selected for each county, and having the well known functions that have heretofore pertained to that office; and that a statute which provides that the revenue agent may assess for advalorem taxes property within the state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is, therefore, unconstitutional.

Assessment is there held to be the listing and valuation of property liable to taxation, according to law, and that it is essential for the apportionment of all advalorem taxes.

The holding in that case was followed by the State Supreme Court in *Johnston vs. Puffer Manufacturing Company* 111 Miss., 240, and in that case, the Court held that the chancery court had no power to assess and equalize taxes.

In *Knox, Attorney General, vs. Southern Paper Company,* 143 Miss., 870, 108 So., 288, it was held that, if in assessing property for taxes either requirement in the Constitution of 1890, Section 112, that property be assessed at its true value, or that the requirement that its assessment be uniform and equal, is to be sacrificed, it must be the requirement as to value and not the requirement as to uniformity and equality, as otherwise, it would deprive the taxpayer of the equal protection of the law guaranteed by the Federal Constitution, Amendment Fourteen. It was there held, also, that it is a matter of common knowledge, that assessing officers of this state systematically and universally assess property at a lower level than its true value.

In *Preston vs. Sturgis Milling Company,* 183 Fed., 1, it is held to be a fundamental principle that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority, that the scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the legislature may prescribe; that the courts may exercise the power of taxation in respect to any of

such steps only when, and to the extent, the legislature has so provided. It is there said, that even where there has been an assessment and levy of the tax so that the amount due from each taxpayer is exactly ascertainable, in the absence of legislative authority, a court has no power to collect the tax and pay it over to the party entitled thereto. Numerous decisions of the Supreme Court of the United States are cited to support what is there said to be a fundamental principle of jurisprudence, settled beyond question.

In the opinion of Justice Anderson, who wrote one of the majority opinions, R., 53, he cites *George County Bridge Company vs. Catlett*, 161 Miss., 120, 135 So., 217, to support his opinion in the case at bar in respect to the requirement of due process, and says, R., 56, that the taxpayer is given his day in court on that issue by the last clause of the statute, which provides that in an action to recover advalorem taxes, the assessment roll shall only be prima facie correct, but Justice Anderson destroyed his own theory, R., 58, when he said that it is true, that in the Delta & Pine Land Company case, which he had cited and in the George County Bridge Company case, the taxpayer had appeared before the board of supervisors and contested their assessments, before the suits were brought. It may be true, as there stated, that the taxpayer in those cases had two hearings on the issue of the valuation of their property. One hearing is sufficient, on the questions of value, equalization and personal liability for the tax imposed, but the thing that is fatal to this case, is that these taxpayers had no hearing at all on these questions.

Justice Anderson in *George County Bridge Company vs. Catlett,* supra, cited *McMillan vs. Anderson,* 95 U. S., 37, 24 Law. Ed., 335, to support his holding in the bridge company case. He relied on the statement made by the Justice who wrote the opinion in the McMillan Case that a statute which gives the taxpayer the right to enjoin the collection of the tax charged against him, and to have the validity of such tax decided by the court, furnishes the taxpayer due process of law, notwithstanding the statute requires that the taxpayer give security in advance as in other injunction suits.

That case did not involve an assessment, but involved the question of liability for the payment of a privilege tax which was imposed by the statute and became due when the person sought to be charged engaged in the business taxed, which necessarily constituted submission to the jurisdiction of the state, for purposes of taxation of the person.

From the report of the McMillan Case in the Lawyers Edition of the United States Supreme Court reports a clear understanding of what was held by that court cannot be had. An examination of the case as reported in 95 U. S., 37, will show, in the statement of the case, which is eliminated in the Lawyers Edition, that two statutes of the State of Louisiana were involved, the

first being the Revised Statutes of Louisiana, Section 2779, which imposed, without the neceessity of an assessment, a privilege tax on retail merchants and liquor dealers, on the merchants, a tax of $15.00, and an additional tax of $85.00 on proprietors of coffee-houses, beer saloons or gardens, or cabarets, making the $100.00 involved in that suit.

The second statute was the Act of the Legislature of Louisiana, approved March 14, 1873, and it prescribed the procedure by which the tax should be collected. Liability for the payment of taxes such as are involved in the case at bar must be imposed by the act of making an assessment by the proper authorities and in the manner prescribed by law.

When one engages in a business which is taxed if he engages in it in the taxing state, jurisdiction is acquired, because the liability was incurred by the voluntary act of the taxpayer, done within the territorial jurisdiction. But the right to acquire title to and own property is not taxed or taxable in Mississippi, nor do these acts confer jurisdiction on the state over the person of the owner. In such cases, the property is taxed and the liability is imposed by assessment.

The amount of the privilege tax was fixed by the statute, itself, and the liability for its payment was incurred by McMillan when he engaged in the business taxed. In determining his liability, one question only

was involved, that is, Did he sell merchandise at retail and operate a coffee house, beer saloon or garden or cabaret?

The suit was for damages for a trespass which he alleged had been committed, and for an injunction against further trespass. The notice prescribed by the Act of March 14, 1873, had nothing to do with the assessment of the tax, but was a necessary prerequisite to the right to collect by seizure and sale of the property of the taxpayer who was delinquent. It will be observed that the notice was given to those who had neglected or refused to pay their licenses for which liability had been incurred by the act of engaging in the business taxed. The notice had nothing to do with the imposition of the tax, that is, with an assessment. See the language of the Act, quoted at page 37 of the Official Report.

The liability was imposed by Section 2779 of the Revised Statutes, part of which is quoted at page 39 of the Official Report. The tax is levied by the Act, not assessed. The head note is confusing. There is no assessment involved.

Attention is invited to the fact, that no question of personal liability was involved. Since no assessment was made in that case, the language of the Court, so far as it discussed assessments, is obiter dictum. Personal notice to the taxpayer is not necessary to the validity of an assessment in rem, but it is an indispensable prerequisite to the imposition of personal liability for the payment of taxes.

The defense made by the tax collector was affirmative. He confessed the seizure, but pleaded that the plaintiff was a tax delinquent and that it was his, the tax collector's, duty to collect the tax, which justified the seizure. A full hearing was had and the defense was sustained. See the first paragraph of the opinion, page 40 of the Official Report. But one issue was involved, whether the plaintiff had been engaged in the business taxed. He was heard on the issue and it was decided against him. Thus, his property was not taken without giving him an opportunity to be heard, and the requirement of due process of law was met.

It will be observed that the United States Supreme Court declined to review this part of the proceedings of the courts of Louisiana, but planted its decision on the statute relating to procedure looking to the collection of the tax. The court held that the question of liability was settled by the courts of Louisiana when the question of fact, as to engaging in the business, was settled. See page 41 of the Official Report.

After that, the only question to be determined was whether the statute relating to procedure looking to the collection of the tax violated the due process provision of the Federal Constitution. The right to resort to the method prescribed depended on the determination of the question of the liability. Liability having been established, the statute which provided for notice, seizure, advertisement of the property and subsequent sale of it did not violate the due process provision and this is all the opinion decides.

The decision in *George County Bridge Company vs. Catlett* is based on the proposition, that the due process requirement is met because the taxpayer may resort to an injunction against the collection of an unlawful tax, citing the McMillan case as authority. The right to recover in the case at bar depends on the validity of the assessment. No tax is due until a legal assessment imposing personal liability is made. Neither the amount nor the personal liability can be fixed in any other way, since the tax is not imposed by the naked fact of ownership.

Wells, Fargo & Company vs. Nevada, 248 U. S., 165, 63 Law. Ed., 190, was relied on by the complainant and the Court decided the case on it as authority. The very elements that are absent in the case at bar, of which complaint is made, were present in the case. The action was brought under Sections 3659 to 3665, inclusive, of the Revised Statutes of Nevada of 1912. These statutes provided a very elaborate scheme for notice to the taxpayer, a hearing on valuation, equalization and levy and they were used as the means to impose personal liability. The case is not in conflict with the decision of this Court in the Dewey Case.

The complaint in the Wells, Fargo Case was against the imposition of the tax on the property which constituted the direct subject of taxation, and not against the consequence of the imposition of a personal liability resulting in a subsequent subjection of other property to the satisfaction of the judgment imposing personal liability. In the Dewey Case and in the case at bar, the complaint is against taking property which

was not the immediate subject of the tax assessment and levy, in the case at bar, the attached land. There is no contention here, that personal liability cannot be imposed, if jurisdiction of the person is acquired, as in the Wells, Fargo Case, but the complaint here is that no jurisdiction was acquired. In the adoption of the statutes of Nevada, the legislature of that state recognized the constitutional requirement that notice be given before the tax became final. In the case at bar, the Supreme Court of Mississippi undertook to dispense with this constitutional requirement, in holding, that these appellants could be brought into court on a cause of action which did not exist, and could thereafter have personal liability imposed, because they answered, correctly, that the State of Mississippi had no right to subject their property to the payment of a debt which did not exist. In Mississippi, the assessment is made final when the roll is approved by the board of supervisors and the state tax commission. R., 21, 22 and 23. *Wilkinson County vs. Foster Creek Lbr. & Mfg. Co.*, 135 Miss., 616, *Moller-Vandenboom Lumber Company vs. Board of Supervisors*, 99 So., 823, 135 Miss., 249, same case, 138 Miss., 289, *State vs. Wyoming Mfg. Co.*, 138 Miss., 249, and *Grenada Bank vs. Town of Moorhead*, 160 Miss., 163, 133 So., 666.

Parker vs. Rising Sun Street Lighting Company, 299 Mass., 498, 118 N. E., 871, and *Greenbaum vs. Commonwealth*, 147 Ky., 450, 144 S. W., 45, Ann. Cas., 1913D, 338, are cited to support one of the majority opinions written by Chief Justice Smith, R., 76.

In the first named case, personal liability of a foreign corporation was sustained on the following grounds:

1. The Corporation maintained an office, workshop and storehouse and conducted its business within the territorial jurisdiction of the Commonwealth of Massachusetts, and it was presumed, therefore, to have complied with the law of that commonwealth which required the appointment of agents for the service of process and other purposes, so that it was authorized to do business there. This conferred jurisdiction over it as a person.

2. That commonwealth had and exercised the power to dictate the terms and conditions upon which the right to do any intrastate business, which business the corporation transacted.

3. No such corporation can accept the benefits open to it on certain conditions and complain that the establishment of personal liability for taxes would deprive it of its property without due process of law.

In the case at bar, the appellants were not located within the territorial limits of Mississippi, had no office or workshop there and have not been shown to have transacted any intra-state business there. No conditions are attached to ownership of land by non-residents in Mississippi. Since there are no conditions, there can be no benefits growing out of conditions, and it follows that estoppel against complaint that to render personal judgments against them without jurisdiction

of the person is to deprive them of their property without due process of law, does not apply. The contention was that the power to tax a nonresident could not be exercised. No contention was there made, that the taxing authorities had no jurisdiction of the person of the corporation when the assessment was made. The corporation challenged the power to impose personal liability under any circumstances. In the case at bar the power to impose personal liability on a nonresident if he is summoned, is not challenged, but it is contended, that no jurisdiction over the person of the appellants was acquired which will support a personal judgment.

In the case at bar, no summons was issued, no appearance was made and the defendants did not submit to the jurisdiction of the assessing authorities at any stage of the proceedings, and the bill itself, is predicated upon the fact, that the taxpayers were nonresidents. The assertion of jurisdiction in the trial court negatives the jurisdiction of the assessing authorities to impose personal liability in the absence of personal notice or an appearance at some stage of the assessment proceedings.

In *Greenbaum vs. Commonwealth,* 147 Ky., 450, 144 S. W., 45, Ann. Cas., 1913D, 338, the court held that the power of the state, as to form and extent of taxation, is unlimited, unless restrained by the Federal Constitution, where the subject to which it applies is within its jurisdiction.

The courts of Kentucky have power to render a personal judgment against a nonresident for the amount of the tax assessed on whiskey stored in his warehouse, where they have obtained jurisdiction of the person of the nonresident by personal service of process within the state, and where such nonresident appeared without protest in the proceedings leading up to the assessment, and made reports required by law, showing the kind and quantity of spirits in his custody as warehouseman. That case presented the proposition, that a taxpayer cannot be subjected to personal liability for taxes on account of the fact, alone, that he is a nonresident of the state.

The answer of the taxpayer in that case admitted an appearance, as set forth in the head note to the case, the substance of which has been stated above, but pleaded in avoidance, that the appearance was involuntary, in answer to the allegation in behalf of the commonwealth, that he voluntarily submitted himself to the jurisdiction of its laws in appearing during the assessment proceedings, thus aiding in bringing about the assessment of the whiskey upon which the tax was subsequently levied. In the case at bar, there is no pretense that the appellants here appeared or otherwise submitted themselves to the jurisdiction of the State of Mississippi.

In Greenbaum's Case, it is said, at page 340 Ann. Cas. 1913D, that the appeal raises no question of personal service upon him, since he was so served while in the state, and that the state contended that *Dewey*

vs. Des Moines, 173 U. S., 193, 19 S. Ct., 379, 43 Law. Ed. 665, and *New York vs. McLean,* 70 N. Y., 374, 63 N. E., 380, were not applicable and did not control, since Greenbaum voluntarily appeared in the proceedings leading up to the assessment of the tax, thus bringing himself within the "letter and spirit of *Dewey vs. Des Moines,* supra, in which stress was laid upon the fact that Dewey had given no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.".

It is said, at page 341, Ann. Cas., 1913D, that Greenbaum offered to confess judgment for part of the tax. After stating the facts to be materially different, the court pointed out the material and controlling difference as being that, in Dewey's Case, the assessment was in the nature of a judgment rendered against him by reason of the assessment alone, but that in Greenbaum's Case it was not contended that the assessment had the effect of a judgment.

McLean vs. New York, 170 N. Y., 374, 63 N. E., 380, is disapproved in Greenbaum's Case, but only so far as it held the New York statute not to apply to non-residents so as to impose personal liability for the payment of taxes. The contention in the case at bar is not that personal liability cannot be imposed upon a non-resident under any circumstances, but that it was not imposed upon the appellants when the assessment was made and that, in seeking relief from the alleged personal judgment they did not thereby submit themselves to the jurisdiction of the chancery court or the supreme

court of Mississippi so as to authorize the imposition of such a judgment by either of those courts.

Bristol vs. Washington, 177 U. S., 133, 44 Law Ed., 701, does not support the position taken by the State of Mississippi or in the opinion of the Supreme Court of that state in the case at bar. What was there held was that the personal property of a citizen of and resident in, one state, invested in bonds and mortgages in another state, is subject to taxation in the latter state; and the amount of the tax is a claim against the property of the person taxed which is a debt that may, in case of death of the person taxed, be proved against his estate in the state and whether the mortgages contracted are subject to the statutes of limitations of the state. The appeal was from a judgment allowing a claim against the estate which was the direct subject of tax, not from a personal judgment imposed without notice or an appearance. Jurisdiction over the estate arose out of the fact that the bonds and mortgages had a situs in Minnesota.

There is no contention in the case at bar, that the taxing authorities of the State of Mississippi had no jurisdiction of the land which constituted the direct subject of taxation. The validity of the assessment and levy was attacked in the state courts, but these issues were decided against the appellants and the state court decisions are conclusive. Jurisdiction to tax the land was never denied.

The decision in the Bristol Case, supra, was rested on the rule, that personal property may be taxed where it is situated, without reference to whether the owner is a citizen of, or resident in, the state which imposes the tax. One of the contentions in the case was that the assessments did not constitute judgments in personam, that the power to tax could be exercised only as against the very property taxed and that judgment could not, therefore, be rendered against the decedents' estate upon such personal judgments. The state did not recover on the assessments as personal judgments, but rested its claim on one statute directing payment out of the estate of taxes in preference to ordinary debts. The court, for that purpose so treated the taxes, but not as being debts in the usual acceptation of the term. The claim rested, also, upon another statute of Minnesota making the taxes assessed upon personal property a lien upon all the personal property of the person assessed. See Section 1623 Gen. Stat. 1894 (Gen. Stat. 1878, C. 11, Sec. 105), and the Official Reports of the Supreme Court of the United States, Volume 177, at page 146.

In that case the only defense on the merits was the want of situs. This issue was decided against the taxpayer, which sustained the jurisdiction and was that on which it rested. If the property had had no situs in Minnesota, the tax could not have been imposed against it and, consequently, there would have been no claim to probate against the estate.

But in the case at bar, the jurisdiction of the court in the attachment suit depended upon the fact, that the appellants were nonresidents, which fact puts beyond controversy the proposition, that no jurisdiction over a nonresident to support an assessment as a personal judgment can be acquired without notice or a constitutional substitute for it. The existence of the necessary jurisdictional fact to support the attachment suit rendered void the alleged personal judgment growing out of the assessment.

It is respectfully submitted that the judgment of the Supreme Court of Mississippi herein complained of should be reversed and judgment entered here for the appellants.

W. E. GORE,
GEO. BUTLER,
Attorneys for Appellants.

I hereby certify that I have this day delivered to Mr. E. C. Sharp, Jackson, Mississippi, Attorney for the Appellee, a true copy of the foregoing brief.

Witness my signature this December 2, 1933.

W. E. GORE,
Of Counsel for Appellants.

APPENDIX

Hemingway's Code 1927.

"8189. Taxes a Debt Recoverable by Action. Every lawful tax levied or imposed by the State, or by a county, city, town, village, or levee board, is a debt due by the person or corporation owning the property or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recovered by action; and in all actions for the recovery of taxes the assessment roll shall be only prima facie correct."

"8245. Sale of Land for Taxes—Advertisement. After the fifteenth day of January the tax collector shall advertise all land in his county on which the taxes have not been paid, or which is liable to sale for other taxes, for sale at the door of the courthouse of the county on the first Monday of April following; such advertisement shall be inserted for three weeks in some newspaper published in the county, if there be one, but in counties having two court districts the land shall be advertised and sold in the district in which such lands are situated, and be put up at the courthouse door, and shall contain a list of the lands to be sold in numerical order as they are contained in the assessment roll, in substance as follows: * * * *."

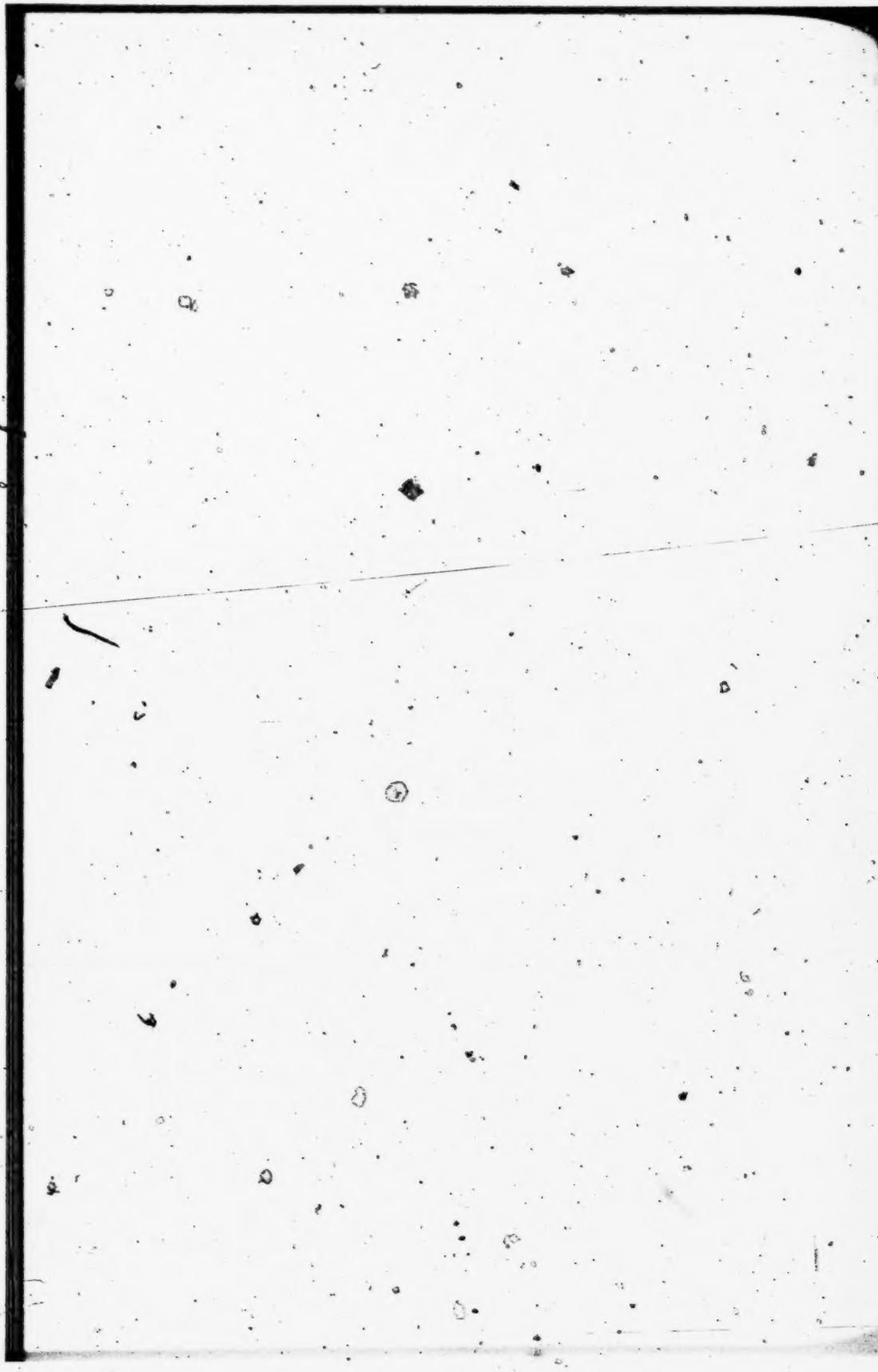
"8247. How Sale Made.—On the first Monday of April, if the taxes remain unpaid, the collector shall proceed to sell the land, or so much and such

parts of the land, of each delinquent taxpayer, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. He shall first offer forty acres, and if the first parcel so offered do not produce the amount due, then he shall offer another until all the land constituting one tract and assessed as the property of the same owner be offered. The sale shall be continued from day to day within the hours for sheriff's sale until completed; but neither a failure to advertise nor error in advertisement, nor error in conducting the sale, shall invalidate a sale at the proper time and place for taxes, of any land on which the taxes were due and not paid; but a sale made at the wrong time or at the wrong place shall be void. And any person sustaining damage by reason of any failure or error of the tax collector may recover damages therefor on his official bond".

Hemingway's Code 1917.

"6886. Taxes a lien, from what date.—Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions incumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for

taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city, town, or village, or subdivision of either."



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No. 298

In the Supreme Court of the United States

OCTOBER TERM, 1933

S. M. NICKEY, W. E. NICKEY,
MRS. ORPHA L. NICKEY, et al, Appellants

vs.

STATE OF MISSISSIPPI

REPLY BRIEF OF THE APPELLANTS

W. E. GORE,
GEO. BUTLER,
Attorneys for the Appellants.

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REPLY BRIEF OF THE APPELLANTS

The appellee in this case has taken three positions, neither of which is consistent with the others.

The first of these positions is:

The complainant pleaded the assessment roll as a judgment imposing personal liability, when the following averments were made, Record 2 and 3:

> "Complainant further shows to the Court that all of said lands (the first tract) were duly and legally assessed to the said A. B. Nickey & Sons for the year 1928, and reference is hereto made to the tax rolls of said county, which original rolls will be produced at the hearing of this case", and "Complainant is informed and believes that said taxes are a

debt due by said defendants to the state, county, levee and drainage districts, and that said taxes are recoverable by suit at the instance of the Attorney General".

Since assessment involves valuation of property; equalization with relation to other property in the county and state, especially where the courts take judicial notice of the fact, that to under value property is the common practice; ownership and identity of parties; and, where personal liability is sought to be imposed, jurisdiction of the person sought to be charged, this pleading tendered the following issues:

A. The land has a value, including the timber, of $80851, the naked land, $21305, and the timber, $59546;

B. These values bear a proper relation to the value fixed generally on lands in the county and state, so as to make the relative values uniform.

C. An assessment against A. B. Nickey & Sons is an assessment against S. M. Nickey, W. E. Nickey and Mrs. Orpha L. Nickey, and they are the owners of said land.

D. They were summoned or were otherwise brought under the jurisdiction of the assessing authorities at a stage of the assessment proceedings which afforded them such a hearing as authorized the rendition of a judgment which imposed personal liability for the payment of the taxes which were levied upon the assessment base of $80851, upon which the tax was calculated, in the sum of $2975.54, for which judgment was entered.

E. Said sum of money is now past due and the Attorney General has the right to maintain an action and subject another tract of land on which the taxes have been paid, to the payment of the personal debt imposed by the judgment.

Section 8189, Hemingway's Code of 1927, makes the roll prima facie correct. Therefore, issue "A" would have been established, but for the subsequent pleading of the complainant, to the effect that the land was not worth the taxes. The roll, which was made an exhibit to the bill, showed the value of the naked land to be $21-305, and the value of the timber to be $59546, a total of $80851, which constituted the base on which the advaforem taxes were calculated, in the sum of $2975.54, excluding the drainage district charges and costs and damages, which the State Supreme Court held could not be recovered. There is no escape from the conclusion, that the defendants were not required to overthrow the prima facie correctness of the roll, in the face of an averment that the naked land is not worth $2975.54, but that the value of it may be assessed at $21305. Pleadings stand on the law as it is, not on the law as it is conceived to be by the pleader; but if the averment could stand on the erroneous theory, that costs, damages and drainage district charges were recoverable, the case rests on no better foundation. The whole demand was $7483.22, and the averment is, that $21305 will not pay it. It would have been utterly foolish for the defendants to offer proof to overthrow the prima facie case made by the roll,

under the statute, in the face of the admission that the land had only a little more than one-third the value shown by the roll.

The defendants were not required to overthrow the presumption in favor of the complainant, on issue B, because the pleadings admit that the land is assessed at nearly three hundred percent of its value.

The defendants contested issue C, in the state court, but the State Supreme Court decided the issue against the defendants and it is the view of the appellants here that this decision is conclusive against them.

There is no pretense whatever and never has been, that the appellants were summoned or appeared or otherwise submitted themselves to the jurisdiction of the assessing authorities at any stage of the assessment proceedings, or that they had a hearing thereon. Neither is it pretended that the assessing authorities were authorized to render a personal judgment against them, nor is it pretended that such a judgment was entered there.

Since the office of the statute, to establish prima facie the correctness of the roll was destroyed by the averment of the bill and the proof that no jurisdiction was obtained, it follows that no money has ever become due and that the Attorney General had no right to prosecute the suit by the attachment of other land on which the taxes had been paid, for the purpose of collecting a personal debt which was not imposed, by a judgment which was never entered.

The defendants were summoned in this case by publication in a newspaper. R., 18, Exhibit No. 2. The defendant in *Mitchell vs. Neff*, referred to in *Pennoyer vs. Neff*, 95 U. S., 714, at page 716, was summoned by publication. Pennoyer rested his title to the land in controversy on a sale under execution on the judgment rendered in *Mitchell vs. Neff*, which this Court held to be void, for the same defect which the appellants urge here, that is, that a judgment without personal service of process is void. The tract of land attached in the case at bar occupies the same situation as the land in controversy in *Pennoyer vs. Neff* occupied. This Court held that the sale of the land in the Pennoyer case was void, and there is no escape from the proposition, that the second tract of land owned by the appellants was not subject to attachment and sale to satisfy the judgment which was never rendered, and which would have been void if it had been rendered.

The second position, page 21, original brief of appellee, is:

In bringing this action, appellee was guided by the opinion on *Mexican Central Railway Company vs. Pinkney*, 149 U. S., 194. Counsel purport to quote the language of this Court in the above styled case, but the quotation which appears at page 22 of the original brief appears to have been taken from the opinion in *Dewey vs. Des Moines*. At any rate, cousel for the appellants have not been able to find the language quoted, in the opinion in *Mexican Central Railway Company vs. Pinkney*. In this situation, speculation will be availed of by the appel-

lants and it will be assumed that the appellee relied on the language of the Court, which appears at page 209 of the report, as follows:

> "Jurisdiction is acquired as against the person by service of process; but as against property within the jurisdiction of the court, personal service is not required. *Boswell vs. Otis*, 9 How. 336; *Pennoyer vs. Neff*, 95 U. S. 714. But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears. *Kendall vs. United States*, 12 Pet. 524; *Harris vs. Hardeman*, 14 How. 334."

It appears to the appellants that this language, as applied to the case at bar, means that the land on which the taxes were delinquent was the subject of an assessment in rem, but that the judgment did not have the effect to bind the appellants personally. It does not appear to be possible to hold the attached land liable although it was located in the territorial jurisdiction of the state, in view of the fact that no control over it was exercised when the assessment was made against the other land. It was the subject of another assessment.

Virden vs. Bowers, 55 Miss., 1, *Powell vs. McKee*, 81, Miss., 229, and *Grenada Bank vs. Town of Moorhead*, 160 Miss., 163, are relied on by the appellee to establish that taxes in Mississippi constitute a debt for which a personal action may be prosecuted. The first of these cases involved the validity of a tax title and the constitutionality of a statute making a tax collector's debt prima

facie evidence of the regularity of tax assessments. The language of the Court, at page 20, to the effect that a legal assessment constitutes the owner of the property debtor to the state is obiter dictum.

In the second case, the court held that an assessment of personal property to an unknown owner is valid. The proceeding by the tax collector was directly against the property assessed. The action was to enjoin the sale of the property. Whether the owner of the property was personally liable was not before the Court and the determination of this question was not necessary to the decision of the case.

In the third case, the Court held an assessment to constitute a judgment rendered for money to be paid, as well as fixing a lien on property. No question of personal liability was there involved.

In *McLaren vs. Moore*, 60 Miss., 376, at page 382, it is said that the state, by its purchase, becomes the owner of the land and the taxes before due are discharged as a demand against the former owner, and that, thereafter only the land is debtor for its taxes. This statement is also obiter dictum, for the question there involved was not one of personal liability under an assessment.

It is said, on the authority of *Grenada Bank vs. Town of Moorhead*, that it is not open to dispute that the assessment for taxes is a judgment rendered for money to be paid, as well as fixing a lien on the property.

Whatever may have been the views of the Supreme Court of Mississippi in using the language here under consideration, these statements are subject to the exception, that, before personal liability can be imposed, personal service must be had on the taxpayer, at some stage of the assessment proceedings. In the absence of such service, the judgment is one in rem only.

The Appellee quotes a part of the opinion in *Wells, Fargo & Company vs. Nevada*, 248 U. S., 165, to the effect, that there is no want of due process where the mode of enforcing the tax is the judicial proceeding to establish personal liability. In Mississippi, the mode of enforcing the payment of the tax is by a sale of the property assessed, and, as was said by counsel for the appellee, at pages 19 and 20, of the original brief, the judgment became final when the assessment was made. In the Wells, Fargo case, the judgment did not become final until after the judicial determination of the question of personal liability.

The third position taken by the appellee, pages 5, 6 and 7, supplemental brief appears to be, that the state is entitled, in the case at bar, to distrain goods to satisfy taxes lawfully levied. *Scottish Union & National Insurance Company vs. Bowland*, 196 U. S., 611, is cited to support this view. It is submitted, that this action is not one for distress of goods, but an action to sell attached land for the purpose of satisfying a personal judgment. The appellee must stand on the case presented by the pleadings, not on it as counsel might have presented it. The remedy provided by the statutes of Mississippi is by sale of the land.

The case cited to support the position of the appellee is not in point, for the Court expressly declined to decide whether there was personal liability. The part of the decree which awarded an injunction against the prosecution of a civil suit was reversed, for the reason, that the defense, that a personal judgment was improper, could be made by answer in an action at law seeking to impose such personal liability, and there was no necessity to resort to a court of equity for relief. The Court said, "It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and if its theory of the controversy is correct, no such judgment can be lawfully rendered". In the brief of counsel for the insurance company, page 616 of the Official Report, it was contended that the insurance company was a non-resident absent from the state, and personal judgment could not be rendered against it. That part of the opinion of the Court quoted, supra, approved this view, which is the view of the appellants in the case at bar.

Bristol vs. Washington County, 177 U. S., 133, is cited to support the theory that other property of a non-resident within the jurisdiction of the state may be sold to pay the tax. Counsel are unfortunate in quoting from the opinion in this case. At page 10 of the supplemental brief, counsel quote the Court as saying that no defense upon the merits appeared to have been relied on except the want of service. The Court said that no defense upon the merits appeared to have been relied on except the want of *situs*. The personal property of Mrs. Bristol could not have been taxed at all, if it had

not acquired a business situs which rendered it subject to the jurisdiction of the state, and the appellants in the case at bar invoked the same rule of law, the only difference being that in the one case, the immediate subject of taxation was property, and in the other persons.

Under the statutes of Mississippi, the lien is limited to the property which is the immediate subject of taxation, but in Minnesota, personal property taxes are a lien on all of the personal property belonging to the persons assessed. See page 146 of the official report of *Bristol vs. Washington County.*

In the original brief of the appellee, it is said that one of the questions before this court, is whether or not the assessments were duly and legally made in the manner provided by law. This statement is entirely too broad and indefinite. The question before this Court, is whether the assessment had the constitutional effect to impose personal liability on the appellants. The assessment was attacked both as a judgment in rem and a judgment in personam. The appellants take the view, that the decision of the Supreme Court of Mississippi is final, on the validity of the judgment as one in rem, but the appellants contend that the judgment is void as imposing personal liability, in view of the due process clause of the Federal Constitution.

Another question which the appellee conceives to be presented, is whether the Attorney General, under his common law and statutory powers, had a right to institute this suit. The appellants do not contend that

this court can or should decide whether he had such authority, but the appellants do contend that the Attorney General had no right to form a conspiracy with the Tax Collector of Tunica County, to discriminate against the appellants, contrary to the Federal Constitution.

The third question which the appellee conceives to be involved here is whether, in rendering judgment imposing personal liability, the due process of law clause of the Federal Constitution was violated. The appellants respectfully submit that it was.

The fourth question, according to the appellee, is whether or not the state, in collecting taxes, is confined to recovery out of the property assessed, or whether it may proceed against other property to collect taxes. It is the view of the appellants, that the statutes command the sale of land for taxes, which sale operates as a discharge of the personal liability, if any ever was imposed, of the benefit of which they have been deprived by the oppressive conduct of the Attorney General and the Tax Collector in violation of the Federal Constitution. The question is not, whether the state may proceed against other property to collect its taxes, but whether the state may plead an assessment roll as a judgment imposing personal liability, and proceed thereunder to sell other property, in the face of the fact, undisputed, that the assessing authorities had no jurisdiction whatever over the appellants.

Since the foregoing part of this brief was dictated, General Lauderdale delivered a copy of another brief written in behalf of the appellee, wherein he undertakes

to show that this Court is without jurisdiction, among other things. The point is, (a) the federal questions here complained of were not raised in the court below, (b) the State Supreme Court held that the proceedings in the chancery court and not the tax assessment fixed the personal liability, and this does not involve a federal question, and (c) the federal questions attempted to be raised have been foreclosed and precluded by previous decisions of the Supreme Court of the United States.

In the opinion of Justice Anderson, R., 55, he said one of the questions was, whether Section 3122, Code of 1930, declaring a lawful tax a debt, for which action may be brought, violates the due process provisions of the state and federal constitutions, and that another question was whether or not the state had the right to bring this suit before the tax collector of the county had exhausted the statutory remedies provided for the collection of such taxes.

As stated by Chief Justice Smith, the questions were, whether the courts have power to collect taxes through their judicial processes, and whether the state has the power to impose personal liability on non-residents for taxes on property owned by them within the state.

A federal question which the highest state court regards as duly before it for consideration, and which it proceeds to determine, will be regarded by the Supreme Court of the United States, on writ of error to the state court or appeal from its judgment, as duly made.

Miedreich vs. Lauenstein, 232 U. S., 236, 58 Law. Ed., 584, 34 Sup. Ct. Rep., 309.

A federal question must be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court, to a state court or an appeal from its judgment, where the latter court has held that the question was sufficiently raised, and decided it. *St. Louis I. M. & S. R. Company vs. Hesterly,* 228 U. S., 702 57 Law. Ed., 1031.

A right claimed under an authority exercised under the United States will be regarded as "specially set up or claimed", within the meaning of U. S. Rev. Stat. Sec. 709 (U. S. C. title 28, Sec. 344), defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the Federal question was assumed to be in issue, that the decision was against the Federal claim, and that the decision of the question was essential to the judgment rendered. *Montana ex rel. Haire vs. Rice,* 204 U. S., 291, 27 Sup. Ct. Rep. 281, 51 Law. Ed. 490.

The objection that a carrier sued for the death of an employee was estopped to rely upon the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. C. title 45, Sec. 51), by having pleaded contributory negligence and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the Federal question

was sufficiently raised, and decided it. *St. Louis, I. M. & S. R. Co. vs. Hesterly*, 228 U. S., 702, 33 Sup. Ct Rep., 703, 57 Law Ed., 1031.

A Federal question must be deemed to have been raised in the state courts with sufficient definiteness to comply with the provisions of the Judicial Code, Sec. 237 (U. S. C. title 28, Sec. 344), governing writs of error from the Federal Supreme Court to state courts, where it appears from the opinion of the state supreme court that a question of the equal protection of the laws, under U. S. Const. 14th Amend. was treated as sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error. *Mallinckrodt Chemical Works vs. Missouri ex rel.* Jones, 238 U. S., 41, 35 Sup. Ct. Rep. 671, 59 Law. Ed., 1192.

The objection that the Federal question was not properly and seasonably raised in the state courts is not available to defeat the jurisdiction of the Supreme Court of the United States of a writ of error to the highest court of a state, where it clearly and unmistakably appears from the opinion of that court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. *Chambers vs. Baltimore & O. R. Co.* 207 U. S., 142, 28 Sup. Ct. Rep., 34, 52 Law. Ed., 143.

A decree of the highest state court which affirmed a decree below, adjudging a person to be in contempt, is reviewable in the Federal Supreme Court, where the state court, instead of disregarding the claim of Federal

right set up by defendant in his answer, on the ground that it had been abandoned in the trial court, recognized the Federal contention, and by its decision necessarily overruled. *Carlson vs. Washington ex. rel.*. Curtiss, 234 U. S., 103, 34 Sup. Ct. Rep., 717, 58 Law. Ed., 1237,

No complaint was made by the appellee for failure to set up, specifically, the Federal questions, in the assignment of errors said to have been committed by the chancery court, in the Supreme Court, until after three briefs had been written on the case in this court. The appellee, the appellants and the Supreme Court of the State of Mississippi have considered these questions as presented, without such strictly technical specifications as General Lauderdale now insists on. If any point had been made prior to or during the hearing in the State Supreme Court, such a defect, if it exists, could and would have been remedied by the appellants, upon the authority of Section 3375 of the Code of 1930, which provides that an appeal shall not be dismissed for want of jurisdiction because of a defect in the application for appeal, or in the bond, or because of any failure by an officer to comply with the requirements of law in reference to appeals but *all defects and irregularities* may be cured by amendment, so as to perfect the appeal and obtain the judgment of the Supreme Court in the case.

Subdivision B, Point I, is a little difficult to understand. If the writer of this brief understands it, it is involved in Subdivision A, so that the answer to one will be a sufficient answer to the other. It was contended in the State Supreme Court, that the defendants in the

chancery court could appear for the purpose of being relieved of the assessment and their personal liability, without consenting or rendering themselves liable to the imposition of a personal judgment in the chancery court when, admittedly, no such judgment was rendered against them during the assessment proceeding. The State Supreme Court decided that they did thereby consent and render themselves liable to the imposition of a personal judgment for the payment of taxes, contrary to the holding of this court in *Dewey vs. Des Moines*, 173 U. S., 193, 43 Law. Ed., 665.

The authorities on which the appellants rely to support their claim that the chancery court hearing on the questions here presented cannot answer the purpose of giving a hearing such as will warrant the imposition of a personal judgment, for the reason that taxes cannot be assessed, equalized or levied, by that court, are:

State vs. Tonella, 70 Miss., 701, at pages 709 to 714. *Brooks vs. Shelton*, 47 Miss., 243, at page 247. Ex Parte Wimberly, 57 Miss., 437, at page 447. *Railroad Company vs. Adams*, 73 Miss., 648, at pages 659 to 662. *Thompson vs. Kreutzer*, 103 Miss., 388. *Johnson vs. Puffer Manufacturing Co.*, 111 Miss., 240, at pages 242 and 243. *Mississippi Railroad Commission vs. Western Union Telegraph Company*, 107 Miss., page 442, at page 452. Griffith's Chancery Practice, Section 441, page 466, *Preston vs. Sturgis Milling Company*, 183 Fed., 1.

Chief Justice Smith made an incomplete statement of the position of the appellants, when he said, R., 76, that the first contention of the appellants, on suggestion

of error, in that the courts are without power to collect taxes through their judicial processes. The position of the appellants, as stated in the Suggestion of Error, Paragraphs 1 and 8, R., 73 and 74, is that the chancery court had no constitutional authority to assess, which involves listing and equalizing, or collect taxes or to impose personal liability therefor, for the reason that the Legislature has not delegated any such power, and since that court had no such power, the Supreme Court was not authorized to affirm its decree in that respect. The Constitution of Mississippi vests this power in the county tax assessor. See Section 135 and 138, Constitution of 1890.

The second statement made by Chief Justice Smith is incomplete. The position of the appellants is that no state can impose personal liability on non-residents for the payment of taxes on property owner by them within the state, without personal service of process at some stage of the assessment proceedings. A statute which lays down a rule of evidence and authorizes a court to judicially determine liability, cannot be amended by the judicial department of the government so as to empower the courts to make an assessment where none was made by the authorities vested with the power to make such assessments. The courts may judicially determine whether a liability exists or not, and the processes of the court may be used to collect the taxes if the liability exists, but an appearance of a litigant in the courts of the state creates no liability for taxes where none existed before the appearance. Taxes are imposed by assessment and liability is not created by an appearance of a litigant who owed no legal duty to pay, personally, the demand.

In the April, 1919, Number of Harvard Law Review, Professor Joseph H. Beale, of Harvard Law School, wrote an article, "Jurisdiction to Tax." From it, the following is quoted:

"The power to tax is one of the attributes of sovereignty; and the jurisdiction to exercise the power is coterminous with the bounds of the sovereign's jurisdiction. 'It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation . . . . The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission . . . . The power to tax involves the power to destroy.'

"The power of taxation, however, vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business.' 'The taxing power of the state . . . . cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. No officer, however armed by statute or court process of this state, can seize upon (such property) for taxes.' A personal tax may be laid upon persons subject to the jurisdiction of the sovereign; a property tax upon all property situated in his territory; an excise or license tax upon all acts done within his boundaries.

"The sovereign who has power to tax is that sovereign who by personal ownership of the territory has the general control of it. Thus where land near the New Jersey shore, under the waters of New York bay, were taxed by New Jersey this tax was held valid, though 'exclusive jurisdiction of and over all the waters of the Bay of New York . . . . and of and over the land covered by said waters' was by agreement of the two states given to New York, saving to New Jersey 'the exclusive property in and to the land under water' on the west side of the bay. Mr. Justice Holmes said that 'The boundary line is the line of sovereignty . . . . Boundary means sovereignty since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears.' On the other hand, where land within a state is ceded to the United States for federal purposes the complete sovereignty passes away from the state, which can no longer levy taxes within the ceded territory.

* * * * * * *

"In the United States the power of a state to tax has been greatly affected by the Constitution of the United States. With constitutional questions as such we are not here concerned. In so far, however, as the Constitution is merely confining a state within the boundaries of its jurisdiction, a decision based upon the Constitution is quite in point on the question, how far does the jurisdiction of the state extend. In fact, the interpretation of several constitutional limitations, and particularly of the Fourteenth Amendment in its bearing on the taxing power, is

merely an exposition of the legal requirement of jurisdiction to tax. When this is the case, decisions upon the constitutionality of tax laws will be freely used as authorities in determining the legal jurisdiction to tax.

"A sovereign may impose upon everyone domiciled within his territory a personal tax, which is 'the burden imposed by government upon its own citizens for the benefits which that government affords by its protection and its laws.' Any domiciled person is subject to this tax, though he may be an alien or a corporation. The tax may be a poll-tax of fixed amount, a tax based to some extent upon wealth, or a tax payable in labor.

"No sovereign may lay a personal tax upon a person or corporation not domiciled within his territory. For this reason he cannot impose upon such a non-resident a personal obligation to pay a tax levied upon property within the territory. Land or a chattel within the territory is subject, as has been seen, to the taxing power although the owner is absent, and a tax laid upon such property may be enforced in rem, but the tax cannot be made a personal obligation of the owner, upon whom the sovereign has no jurisdiction to impose an obligation.

"This principle has been forcibly stated by the courts. Thus, in *Dewey vs. Des Moines,* Mr. Justice Peckham said:

" 'The state may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. . . . . The jurisdiction to tax exists only in regard to persons and property, or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question.' "

The appellants respectfully request the Court to give careful consideration to the dissenting opinions of presiding Justice Ethridge, of Division B of the State Supreme Court. The arguments there made by him will not be repeated by the appellants.

Justice Anderson, in stating, R., 55, the sixth question involved in the decision of this case, made an incomplete statement of it. The position of the appellants, is that the Attorney General had no right to maintain this action when he had formed a conspiracy with the tax collector to discriminate against the appellants in violation of the Constitution. This position is stated in Paragraphs 22 and 23 of the answer, in the chancery court, R., 13 and 14.

It is respectfully submitted that this case should be reversed and judgment entered here for the appellants.

W. E. GORE,
GEO. BUTLER,
Attorneys for the Appellants.

I hereby certify that I have this day delivered to Gen. J. A. Lauderdale, Jackson, Mississippi, Attorney for the Appellee, a true copy of the foregoing brief.

Witness my signature this December....., 1933.

W. E. GORE,
Of Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, ET AL.,

VS.

STATE OF MISSISSIPPI, EX REL, GREEK L. RICE, Attorney General.

STATEMENT OF FACTS AND BRIEF FOR APPELLEE.

STATEMENT.

OFFICIAL REPORT 145 So. 630.

This is an attachment in chancery by the Attorney General to subject certain property, owned by nonresident defendants, to the payment of delinquent taxes, state, county, levee and drainage, for the year 1928, the property attached being situated in Tunica County, Mississippi.

Defendants owned large timbered tracts of land in Tunica County and were cutting and removing the timber from said lands and failed and neglected to pay the ad valorem taxes that were lawfully assessed against the real estate, and permitting the lands, after denuding the same

of the timber, to sell for its taxes, it being alleged that the denuded land would not bring the taxes at a tax sale.

To avoid the loss of this revenue to the state, county, and taxing districts of the county, a bill was filed and an attachment was issued seizing certain other property of the defendant, which property was released upon defendant's executing a bond as required by law.

The defendants filed an answer to said bill in due course, and appeared in court and a trial was had, both sides introducing evidence to sustain their respective positions.

The Supreme Court of Mississippi held in the case of *Nickey v. State*, 145 So. 630, that the drainage taxes sought to be collected by this bill were not a debt under the laws of the State of Mississippi, and also held that the printers' fees, and sheriffs' fees were not collectible in this action, but it held that the Attorney General was authorized by law to bring this suit for the collection of the taxes involved in this proceeding, except the drainage taxes, and sheriffs' and printers' fees, and affirmed the decision of the lower court as to all taxes except the drainage taxes sought to be recovered in this suit, and no cross appeal having been prosecuted from this decision, the only question now before the court is the validity of the judgment of the state court for the collection of the ad valorem taxes.

BRIEF.

As we understand the case presented to this court the only questions involved are: (1) Whether or not the as-

sessments were duly and legally made in the manner provided by law; (2) Whether or not the Attorney General, as chief law officer, under his common law and statutory powers, had a right to institute this suit for the recovery of the ad valorem taxes involved; (3) Whether or not the due process of law clause of the Federal Constitution has been violated; and (4) Whether or not the State, in the collection of taxes, is confined to a recovery out of the property assessed, or whether it may proceed against other property to protect its rights.

The statute pertaining to the assessment of lands material to the determination of the issues herein involved, are the following: Sections 3132, 3145, 3146, 3147, 3148, 3149, 3151, 3161, 3162, 3164, 3165, 3166, 3167, 3172, 3173, 3177, 3178, 3179, Code of Miss. 1930, which scetions are substantially the same as the assessment statutes of Hemingway's Code, 1917 and are as follows:

SECTION 3132:

> "The tax assessor shall call upon each person liable to taxation in his county for a list of his taxable personal property, either in person, or by leaving a copy of the prescribed tax list at his usual place of residence or business, and it shall be the duty of each person to make out and deliver to the tax assessor, upon demand, and if not demanded, not later than the first day of April in each year, a true list of his taxable property with the value of each article, specifying all such property of which he was possessed on the next preceding tax lien date in his own right or in the right of his wife or minor child, or as executor,

administrator, guardian, trustee, agent, or otherwise, rendering separate lists of the property of each. The taxpayer shall fill in all blanks on the tax lists and show in the proper place all taxable personal property owned by him or by any person for whom he is required to give in taxable property. Such list shall show where the property was situated on the next preceding tax lien date and he shall render separate lists for personal property where located in a school district, or a road district, and the list, or lists, required to be rendered by every person shall show clearly the taxing district or municipality in which the property was subject to taxation on the tax lien date next preceding. Each list shall be verified by oath which the assessor, or his deputy, is authorized and required to administer, to each person, as follows

" 'You do solemnly swear (or affirm) that the list of property you have made for purposes of taxation is a just and true account of all property you are required to render subject to taxation in your own right, or that of any other person for whom you ought to give in taxable property, and that each statement of fact is true and correct as stated, and that no property subject to taxation has been omitted and all property has been listed at its intrinsic taxable value so help you God.' If any person fails to furnish the assessor with a list of property as required by this section, or if the assessor finds or obtains information of property owned by a non-resident or someone unknown to the assessor, such property shall be assessed and valued by the assessor at the highest value at which similar property is assessed and valued;

and where the owner is unknown to the tax assessor the property shall be assessed to the person having the same in charge."

SECTION 3145:

"It shall be the duty of the tax assessor to assess all the lands in his county and he shall require the owner, agent, or person having possession, or charge, of any lands, to render a list of all lands owned, or in charge, or in possession, of such owner, agent, or person, and lands shall be assessed according to its true value, taking into consideration the improvements and timber thereon, the proximity to navigation, to a railroad, to a city, town, village, or road, and any other circumstances that tends to enhance its value, and not at what it might bring at a forced sale, but what the owner would be willing to accept and would expect to receive for it if he were disposed to sell it to another able and willing to buy. Every person owning or being in possession, or in charge, of any land shall deliver to the tax assessor on demand and not later than April first in each year in which land is assessed, a list of all lands owned by, or in possession, or charge, made out on the tax lists prescribed; and showing the total number of acres (except the land be platted by blocks and lots), the total number of acres of cultivatable lands, and the value thereof, the total number of acres of timbered lands and the value of the land, and the number of thousand feet of timber thereon and its value, and the number of acres of uncultivatable land and the value thereof; and buildings or improvements subject to taxation on any lands returned for assessment. If the lands be surveyed and platted it shall be re-

turned so as to clearly identify it by the recorded plat thereof, and the list rendered shall disclose the value of each lot and the value of any buildings, structures, or improvements thereon. Any person required by this section to render a list of any lands shall show in what road district, school district, levee district, municipality, or other taxing district the same is located. If any person shall deliver or disclose to an assessor, or deputy assessor, a list, statement, or return in regard to his land which, in the opinion of the assessor, or deputy assessor is false or fraudulent, or contains any understatement or undervaluation, or fails to show the proper classification of lands or fails to show timber, buildings and improvements, or other elements of value, the assessor shall make an assessment of the land with the proper classification thereof including the omitted things, at a valuation equal to the highest value at which like lands similarly situated are assessed. Lands not given in by any person shall be assessed in the same manner by the assessor at a valuation equal to the assessment of other like lands similarly situated and all timber, buildings, and improvements, or other elements of value shall in all cases be separately valued and assessed."

3146. *Buildings, Minerals, etc., Separately owned.*—Whenever any buildings, improvements or structures, mineral, gas, coal, oil, timber or similar interests in real estate, including building permits or reservations, are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, or when any person reserves any right or interest, or has any leasehold in the elements above

enumerated, all of such interests shall be assessed and taxed separately from such surface rights and interests in said real estate, and shall be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes. All interests in real estate herein enumerated shall be returned to the tax assessor within the same time and in the same manner as the owners of lands are now required by law to list lands for assessment and taxation and under like penalties. The tax assessor shall enter the assessment of the interests herein enumerated upon the assessment roll by entering the same upon the next succeeding line or lines of the roll following the assessment of the surface owner, the name of the owner and the name of the interest, and by placing the value in the appropriate column or columns on the roll. And the value of said interest or interests shall be determined and fixed in the same manner and by the same officials now required by law to value and assess property for taxation.

3147. *How lands not rendered assessed—All lands to be accounted for.*—It shall be the duty of the tax assessor in each county to assess the lands in the county. Lands not rendered, or returned shall be assessed by him as provided in the previous section; and it shall be the duty of the board of supervisors to furnish the tax assessor with all necessary maps, or plats, of the county, and of every portion thereof, including municipalities, and every survey, subdivision or addition thereto, and of every school district, road district or other separate taxing districts. Such maps or plats shall be uniform in size, drawn to scale, and shall show clearly the location of all tracts of

lands in the county and every portion thereof, and shall show the boundaries of every supervisor's district, road district, school district, or other taxing district, and of every municipality, and of every survey, subdivision, or addition, and of all separate, adjacent, annexed territory, added to any separate school district, and he shall compare his rolls with such maps and see that the whole of his county is assessed.

SECTION 3148:

"In making his land roll the assessor shall commence the assesment with the lowest number of range and township in his county, and with the northeast corner of each township, and shall proceed numerically, with all the sections, townships, and ranges in his county, first setting down all the subdivisions of each section, if they belong to different individuals, or the whole section together, if owned by one person, and not divided on account of parcels being of different values; and if more than one person shall claim to be the owner of the same tract or parcel of land the assessor shall so state in his assessment roll, and the tax collector shall only collect the taxes on one assessment. Land of the state or of the United States, and other land exempt from taxation, shall be listed as other lands, but without the value, except as otherwise provided. And if the owner of any lands be unknown it shall be assessed to 'unknown.' Lands not surveyed according to the plan of the government surveys, shall be assessed by the designation used on the government maps, or by other description or names by which they may be distinguished; and if parts of such lands shall be owned by different persons, such part

shall be referred to by quantity, and such short memorandum as may be convenient to show the locality. In assessing lands situated in any city town, or village, the assessor shall proceed according to the plat or plan thereof, commencing with the lowest number of square or block and lot, or other subdivision, and proceding numerically with all the lots in a square or block, and all the squares in the city, town or village until complete.

"Lands assessed by the state tax commission shall be listed, buth without value, on the rolls by the assessor for the purpose of completing the description of all lands in the county, but for no other purpose.

"The assessor shall show in separate columns on his roll in what road district, school district, or other separate taxing districts each parcel of land is located and subject to taxation, and where a parcel of land owned by one person lies partly within and partly without any taxing district the assessment shall be divided and separately assessed so as to show the number of acres and the classification of the land in each separate district with the value thereof. Where a taxpayer renders a list of his lands and fails to show in what taxing districts, or municipality the same is located and subject to taxation, the tax assessor shall enter the assessment in separate columns so as to show the assessment for the respective districts or municipality. He shall show the total of each and every column on his roll and carry the result thereof to the recapitulation; and he shall extend into the column for 'Total' the amount of each separate assessment; and shall show in his recapitulation the total assessment of every taxing district, or municipality in his county."

SECTION 3149:

"A failure to observe the requirements of the last preceding section shall not vitiate any assessment, if the land be so described as to be identified; and it shall be sufficient identification of land to describe it as the land of ..... (the person owning or claiming it), occupied by ..... ; or that part of (section or other known division designating it) owned or claimed by ..... ; or the lot on which ..... resides; or the lot occupied by ..... ; or by the name by which it may be known; or by any description which will furnish a sure guide for the ascertainment by parol evidence of the particular land intended."

3151. *Description of land.*—In assessing land, a description of it as a part of a designated tract or division, shall be held to embrace such part as is the subject of separate ownership, as one tract or division, whether owned by one or several jointly; and when part of a designated tract or division shall be sold for taxes, the sale shall pass the title of such part as was the subject of such separate ownership when it was assessed; and the sale of a specified number of acres of a tract containing more, or a specified portion of a tract, shall pass an undivided interest in the whole tract equal to the proportion which the number of acres or portion sold bears to the whole tract; and when part of a known tract or division of land is assessed by a description which identifies it, any other part of it which is assessed but not so identified, shall be held to embrace all of such tract or division not included in the part identified; and parol testimony shall always be

admissible to apply a description of land on the assessment roll, or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony.

3161. *When assessment rolls filed—board may extend time.*—The assessor shall complete the assessment of both real and personal property and file the roll or rolls with the clerk of the board of supervisors on or before the first Monday in July of each year. He shall make an affidavit and append it to each roll, showing that he has faithfully endeavored to ascertain and assess all the persons and property in his county; that he has not omitted any person or thing, or placed upon, or accepted an undervaluation of any property, through fear, favor, or partiality, and that he has required every taxpayer to make the oath required to be taken by the person rendering a list of his taxable property wherever possible; and the assessor shall file with the roll, or rolls, under oath, a list showing the name of every taxpayer who has failed or refused to make oath to his tax lists. If the assessor fails to file his roll, or rolls, on or before the first Monday in July of each year the board of supervisors at its July meeting shall adopt an order showing the failure of the assessor to file his roll, or rolls, and shall certify to the state tax commission a statement showing such failure and the time necessary for the assessor to complete his roll, or rolls. Upon receipt of such certificate from the board of supervisors of any county, the state tax commission shall, by order entered on its minutes, provide when such roll shall be

completed and filed, the date when the board of supervisors shall meet to equalize the roll, or rolls, and the time when objections to the assessments contained in such roll, or rolls, shall be heard by the board of supervisors, provided that not less than ten days notice shall be given prior to the hearing of such objections. When such roll, or rolls, shall be filed they shall be dealt with in all respects as now provided by law except as to the time.

SECTION 3162:

"The board of supervisors shall immediately at the July meeting proceed to equalize such rolls and shall complete such equalization at least ten days before the August meeting, and shall immediately by newspaper publication notify the public that such rolls so equalized are ready for inspection and examination. In counties having two judicial districts the board shall by order designate on what days during August it will begin in each of the two districts upon its hearing of objections, and these days shall be named in the said notice, and the board shall be authorized to hold its sessions in the two districts respectively as designated in the order aforesaid. The foregoing provision with reference to counties with two judicial districts shall apply to any subsequent meetings where of notice to taxpayers is necessary, to be given."

3164. *What to be done.*—At the meeting for the equilization of assessments, the board of supervisors shall carefully examine the roll or rolls, and shall then and there cause to be assessed any person or thing that may be found to be omitted,

and anything found to be undervalued may be correctly valued. And in the year in which the land assessment is made the board shall carefully examine the land roll and see that it embraces all the land in the county, and correctly represents it as being the property of individuals or the state or United States, according to the fact, and taxable or not taxable according to law, and that all is correctly described so as to be identified with certainty, and that there are no double assessments; and all land improperly omitted from the roll shall be added thereto by the board or under its direction, and land incorrectly or insufficiently described shall be properly described, and land which is not classed correctly or undervalued shall be properly classfied and valued. And the board shall cause all corrections to be made in the rolls, which, being done, the board shall enter an order approving the assessments, with or without corrections, as the case may be, subject to the right of parties in interest to be heard on objections as hereafter provided.

3165. *Objections to Roll—Supervisors to hear—When and how.* The board of supervisors of each county shall hold a meeting at the courthouse, or at the chancery clerk's office in counties where the chancery clerk's office is in a building separate from the court house, on the first Monday of August, to hear objections to the assessment and to examine the same. The assessor shall attend the meeting, and the board shall examine the assessment rolls, and hear and determine all exceptions thereto, and shall sit from day to day until the same shall have been disposed of,

and all proper corrections made; and the board shall equalize the assessment and may increase or diminish the valuation of any property, so that property of the same value shall be assessed for an equal sum. And where an individual assessment has been increased immediate notice in writing shall be sent by mail to the person whose assessment is increased by the clerk of the board of supervisors and at said meting the board shall have the power to change erroneous assessments or to add omitted property but any person affected by such action shall have notice as next above provided; and if the board adjourn before considering the objection filed, such objections shall be heard at the nex tregular meeting of the board."

3166. *Objections must be filed or assessments to stand.*—A person who is dissatisfied with the assessment may, at such August meeting, present objections thereto in writing which shall be filed by the clerk and docketed and preserved with the roll. All persons who fail to file objections shall be concluded by the assessment and precluded from questioning its validity after its final approval by the board of supervisors or by operation of law, except minors and persons non compos mentis.

SECTION 3167:

"If from any cause the meeting of the board of supervisors at which objections to assessments should be heard, be not held, then all such objections shall be continued and may be heard at the next meeting of the board, either regular, adjourned, or special; and if the board fails to give the proper notice to the taxpayers of the meeting

at which objections are to be heard the board shall immediately proceed to give such notice and shall fix the time when it will hear and determine all objections to the assessments therein contained, and the board shall proceed and deal with the roll, or rolls, with all the powers and duties as are now provided by law, except as to the time. If the board fails to hold any meting, or give any notice, or to perform any other duty in reference to the assessment roll, or rolls, at the time required by law, such duty shall be performed at a later date upon the giving of proper notice to persons affected."

3172. *How assessment approved.*—Assessments must be approved by an order of the board of supervisors entered on the minutes; but the failure to make and enter such order shall not vitiate the assessment if it shall appear that the assessment was made according to law.

3173. *Validity of assessment not affected, etc.*—The failure of the assessor to certify and swear to his assessment roll, or to return it on the day named for its return, shall not affect the validity of the assessment if approved by the board of supervisors.

3177. *Tax Commission to notify board of supervisors, action on rolls.*—When the tax commission has completed its examination of the recapitulations, and within thirty days after the receipt of recapitulations from three-fourths of the counties of the state, it shall, by orders spread upon its minutes, direct what percentage shall be added to or taken from the assessments of any one

or more classes of property on the respective roll or rolls of the counties from which recapitulations have been received, in order to bring about equality and uniformity of the assessments of property throughout the state; and that all property in general shall be assessed as nearly as possible at true value; or if the commission finds that the assessment of any county or counties is reasonably equal and uniform with the assessment of other counties, and in proportion to the true value of the property and does not require an increase or decrease in the assessment of any class of property, in order to secure such equality and uniformity, the commission, shall, by order spread upon its minutes, approve the said assessment roll or rolls, and direct the board of supervisors thereof, to have copies of the said rolls made as required by law. Like orders shall be adopted by the commission with respect to the recapitulations of all the remaining counties as they are received by the commission. The commission shall require its secretary to send by United States mail to the president of the board of supervisors a certified copy of the order adopted with reference to the recapitulation of assessment rolls of the respective counties, instructing and directing the respective boards of supervisors as to what percentage shall be added to or taken from the assessments of the various classes of property on the roll or rolls of the said counties! or if no change be ordered, a copy of the order accepting the rolls; and directing that copies be made.

3178. *Duty of Board of Supervisors to make changes as directed.*—When the president of the board of supervisors shall receive the copy of the

instructions from the state tax commission he shall immediately call a meeting of the board of supervisors of his county and shall give notice thereof by publication, five days before the date of the meeting and shall set forth in said notice the purpose of the meeting specifying the class, or classes, of property to be increased or decreased in accordance with the order of the state tax commission and notifying all taxpayers owning property effected by the order of the state tax commission that at the said meeting the board of supervisors will carry out the orders of the commission and that any taxpayer aggrieved by the action of the board may present objections to any increase in the assessment of his property. When the board of supervisors convenes pursuant to the said call and notice of the president it shall proceed to consider the instructions of the state tax commission and if the board be dissatisfied with the changes and corrections ordered to be made by the state tax commission the board may, by order, direct the president of the board of supervisors to appoint not exceeding five witnesses to appear before the state tax commission and to testify, under oath, with reference to the orders of the said tax commission directing changes or corrections in the rolls of their county; and the members of the board, its attorney, tax assessor and chancery clerk may appear before the commission and give evidence with reference to the said assessment; and in its aforesaid order the board may fix a day for its meeting for the further performance of its duties required under this section. The said witnesses shall appear before the state tax commission in its office at Jackson within thirty days after the mailing of the

copy of instructions to the president of the board of supervisors, or they shall lose their right to be heard. The compensation and expenses, if any, shall be paid by the board of supervisors of the county affected. The state tax commission shall hear the complaints and objections of any board of supervisors and witnesses appointed as herein provided and may adopt an order modifying or rescinding its former order directing an increase or decrease in the assessment of any class, or classes, of property. The decision of the state tax commission when made shall be final and it shall be the duty of the board of supervisors to immediately revise and correct the assessment of the classes of property affected by the order, in accordance with the instructions of the commission. In carrying out the orders of the state tax commission the board of supervisors shall, first, correct any errors in their former equalization and may add to the roll any person or property found to be omitted and then shall apply the percentage of increase or decrease as ordered by the state tax commission to the respective class or classes of property; but the board shall not apply an increase to the assessment of all taxpayers owning any class of property affected by the order of the tax commission until it has first corrected all errors in its former equalization to the end that no particular parcel of property within a class shall be raised above its actual value when the required percentage of increase is applied to that class. The revised and corrected property valuations thus made shall be the fixed and legal valuation of the property for the payment of taxes, and it shall be the duty of each and every taxpayer to pay his taxes thereon accordingly.

SECTION 3179:

"Any taxpayer who feels aggrieved at the action of the board of supervisors in equalizing his assessments shall have the right of appeal to the circuit court in the manner provided by law, within ten days after the adjournment of the meeting of the board of supervisors, at which the approval of the roll by the state tax commission is entered."

This suit was instituted under the provisions of Sec. 6887, Hemingway's Code of Mississippi, 1917, which is the same as Sec. 3122 Code of Mississippi 1930, to collect taxes assessed by virtue of the provisions of the above numbered sections.

In the case of *Virden v. Bowers*, 51 Miss. 1, the rule is laid down that a legal assessment constitutes the owner of the property debtor to the State, and that a delivery of the assessment roll to the collector authorizes him to receive the money as therein charged, and further states that "the assessment roll, or a copy placed in the hands of the Sheriff is like an execution, and arms him with power to enforce the collection of the money, if default is made in the payment."

This case was decided in 1877 and defines a tax as a debt, and the rule therein announced has been followed by an unbroken line of decisions to the present date.

In the recent case of *Grenada Bank v. Town of Moorhead*, 133 So. 666, the court said:

"It is not open to dispute that the assessment for taxes is a judgment rendered for money to be paid, as well as fixing a lien on the property."

Almost since the creation of the State, it has been the law that a tax legally assessed was a debt, not by contract but by law, and the purchaser or owner of real estate in Mississippi acquires or holds same with due notice that all taxes legally assessed against said property becomes a debt against the owner, recoverable in an action at law.

As said in the case of *Winter v. Montgomery*, 79 Ala. 481;

"A tax roll is not a judgment roll, and a tax thereon does not partake of the nature of a judgment, except as to its validity and amount and the manner in which it can be proven. The authority for the tax and its binding effect upon the person taxed rests upon the authority given to the taxing officer by the legislature. When the taxing officers have jurisdiction, their action cannot be attacked collaterally, and to that extent the tax is in the nature of a judgment. The tax, however, does not become a debt within the meaning of such word as commonly used. Taxes do not rest upon contract, express or implied. They are obligations imposed upon citizens to pay the expense of government. They are forced contributions, and in no way depend upon the will or contract, express or implied, of the person taxed."

It is said by Cooley in his work on taxation 3rd edition, volume 1, page 19:

> "The assessment of the tax, although it may definitely and conclusively establish a debt for the purpose of statutory collection does not constitute a technical judgment, and the taxes are not contracts between party and party, either expressed or implied, but they are the posistive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required."

Therefore, under this rule, while the amount of the tax is definitely fixed and a lien imposed, the tax cannot be collected, except by the sale of the property, until the owner is brought into court and judgment obtained by due process of law, and in this particular case, as found from the facts of the Chancellor and affirmed by the Supreme Court of Mississippi, the tax was duly and legally assessed and the amount fixed, and by this proceeding defendants were brought into court by writ of attachment and given every opportunity for a hearing and contest of the demands made by appellee's complaint in the court below, of which opportunity they availed themselves by entering their appearance, filing a general answer denying all the allegations of the bill and introducing evidence in support of their contentions, and were, thereby afforded due process under the Constitution of the United States and of the State of Mississippi.

In bringing this action, appellee was guided by the opinion in the case of *Mexican Central Railway Company v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699, in which the court said:

"A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the court or other jurisdiction in ordinary action to enforce a personal liability, and no jurisdiction thereby acquired over the person of a non-resident further than respects the property so taken. This is as true as in the case of an assessment against a non-resident, of such a nature of this one, as in the case of a more formal judgment."

We especially call the court's attention to the case of *Wells Fargo & Company v. Nevada*, 63 L. Ed. 190, 248 U. S. 165, in which the court said:

"There is no want of due process of law in a tax assessment because the assessment was made without notice to the taxpayer, or without an opportunity to be heard, where the mode of enforcing the tax is by a judicial proceeding wherein process issues, an opportunity is afforded for a full hearing, and only after there is a judgment sustaining the tax is payment enforced.

"It is no longer an open question in this State that if a party against whose property assessment has been made, shall at any time in the course of proceeding before a conclusive judgment be afforded by law an opportunity to contest its correctness, he is afforded due process of law."

To the same effect is *Gallop v. Smith*, 183 U. S. 300, 46 L. Ed. 207, and authorities cited therein.

In the present case, under the statutes, defendants had notice of the time of approving the assessment roll, due

notice was given of the filing of the roll as required by law, and an opportunity given to all taxpayers to protest; and in addition there to, they were brought into court in this proceeding and again given an opportunity to contest the legality of the assessment and the amount thereof, and the records in this case demonstrate that they took advantage of this opportunity and contested every point in issue, and certainly they cannot now claim that they have not been afforded due process of law, or had the advantage of all the rights guaranteed to them under the Constitution of the United States, or the State of Mississippi.

The case of *Dewey v. City of Des Moines*, 43 L. Ed. U. S. 665, was strongly relied upon by appellants in the State Courts to sustain their contention, but, in our opinion, this case supports the contention of appellee. In the Dewey case, the court said:

> "A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in ordinary action to enforce a personal liability."

And we concede that in the present case, that but for the appearance of defendants no judgment should have been entered against them other than to the extent of the value of the property brought before the court, or so much thereof as might have been necessary to satisfy the tax. Are the taxes in question a debt recoverable by action?

This question is answered by section 6887 of Hemingway's Code of 1917, this section being in force at the time

of the suing out of the attachment in this case, said section being as follows:

> "Taxes a Debt Recoverable by Action.—Every lawful tax levied or imposed by the State, or by a County, city, town, village, or levee board, is a debt due by the person or corporation owning the property, or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recovered by action; and in all actions for the recovery of taxes the assessment roll shall only be prima facie correct."

Under the law existing at the time the debt herein was incurred or accrued, all ad valorem taxes of the State of Mississippi accrued and became a debt and were a lein upon the property from and after the first day of February of each year, and defendants herein became liable for the debt upon which this action is based from the first day of February, 1928, even though the assessments were not made until a later date, and being a debt under the statute it could be collected in any way that any other debt was collectible.

As was said in the case of *Powell v. McKee*, Tax Collector, 81 Miss. 229:

> "By section 3747 a tax upon personal property is made a debt due by the person owning the property, when assessed, whether properly assessed or not, and this is entirely in harmony with the preceding section, which makes a tax a charge upon a thing taxable, whether rightfully or wrongfully assessed, and taking both sections to-

gether, it is, we thing, a necessary conclusion that personal property may be rightfully assessed to an unknown owner.—The taxes are due from the property itself,, as well as constituting a debt from the owner; and if the latter secretes himself, it is but just that the former adjust the demand."

In the case of *Delta Pine Land Company v. Adams* 93 Miss. 340, 48 So. 190, the court said:

"The manifest purpose of the legislature in enacting section 4256 was to provide an individual remedy, and to create a new right by which the essential nature of the obligation for taxes as taxes should be changed from the nature such obligation had as taxes alone to the nature or quality they would have as debts, and thus give to the sovereignty a better right, and an additional and more effective remedy for the collection of taxes."

It is further held in the above case that section 4256 of the Code of 1906 does not confine the remedy to courts of law.

In the case of *Railroad Company v. Adams* 78 Miss. 895, the court said:

"Section 3747, Code of 1892, does not change the law declaring the tax a debt. It is a debt by virtue of the legislative declaration and not a debt arising by contract. The effect of section 3747, supra, is to make the owner liable in personam, for the whole of his taxes collectible as provided by section 3826 of the Code of 1892."

The case of *McLain, Receiver of Taxes, v. Myers*, decided by the Court of Appeals of New York, 2nd Division, on October 1, 1892, and reported in 32 N. E., page 63, was a suit for taxes based upon the following statute:

> "Any tax duly imposed for personal property upon any person or corporation in the city and County of New York, and which shall remain unpaid and in arrears on the 15th day of January succeeding the year in which it shall have been imposed may be recovered, with interest and costs, by the receiver of taxes of said city in an action in any court of record in the State."

It was contended by the defendant in that case that said section conferred no right upon the receiver to institute suit against a non-resident of the city and County of New York, but the court said:

> "We think, however, that the phrase, 'any tax duly imposed' refers to the place where the tax was laid, rather than to the residence of the person upon whom it was laid, and that the section should be construed so as to read 'any tax duly imposed in the city and County of New York upon a person or corporation.'"

> "It is natural that the remedy thus provided should be limited to the taxes imposed in the particular locality affected by the statute, and the language used is appropriate to that object but not to the limitation depending upon the residence of the person taxed, because nothing is said upon that subject. No word is used that suggests residence, and we are not at liberty to insert one. The use of the general term 'any tax' and 'any person'

indicates an intention to include everyone taxable upon personal property in the city of New York under any statute. ——————— There is greater need of the remedy in the case of non-residents, because absence from the city makes the enforcement of the tax more difficult. We think that the language used confers a general right of action in personam to collect taxes imposed for personal property, and that, if the legislature had intended to except a single class from the operation of the section, it would have done so in express terms."

It was contended by appellants in the State Courts that, inasmuch as the lands upon which the taxes in this case were levied were not sold by the Sheriff, that they were discriminated against and that under our statutes, the sale of the property is the exclusive remedy, but such does not seem to be the general rule. In the following cases it is held that a remedy created by statute for the collection of taxes is not exclusive of all others, unless the statute expressly makes the remedy exclusive. It is held that a tax is collectible by a common law action in the absence of any statute, and that the legislature is presumed to have intended to provide a remedy in addition to those already existing.

——— *"Delta & Pine Land Co, v. Adams* 93 Miss. 340, 48 So. 190, *Nickey v. State,* 145 So. 630 7 Anno. Cas. 20-21. Annotations.

United States: *Dollar Sav Bk. v U. S.* 19 Wall. (U. S.) 227 28 Fed. Cas. No. 16,647;

People v. Ballerino, 99 Cal. 598, 34 Pac. Rep. 330;

Geneva v. Cole, 61 Ill. 397;

Appeal Tax Ct. v. Western Maryland R. Co. 50 Md. 274;

State v. Memphis, etc., R. Co., 14 Lea (Tenn.) 56.

"This rule is based upon the ground that taxes properly levied and assessed create a legal liability against the owner of the property, which may be enforced in an action at law independently of the remedy created by statute."

Winter v. Montgomery, 79 Ala. 481.

In the case of *Greenbaum v. Commonwealth*, 147 Ky. 450, 144 S. W. 45 Am-Eng. Anno. Cas. 1913-D, page 388, the question was raised as to the power of the Commonwealth or the County to impose a personal liability on a non-resident for taxes upon property owned, or in the custody of such non-resident and lying within the County or State imposing the tax. In this case, the defendant was personally served with process while in the State of Kentucky, and the court said:

"The answer does not raise the question of right of jurisdiction over a person in the court trying the case but asserts legal jurisdiction in the taxing power to create or establish any personal liability as the basis for the judgment. It is elementary law that the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within the jurisdiction of the taxing powers, unless it be restrained by the provisions of the Federal Constitution."

As was well said by Chief Justice Marshall, in *McCullock v. Maryland*, 4 U. S. L. Ed. 579:

> "It is obvious that it is an incident of sovereignty and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are subjects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

In the case of *Greenbaum v. Commonwealth*, supra, the court stated further:

> "The statute, by its terms, makes it the duty of Greenbaum to pay this tax; and, having voluntarily appeared in the proceedings which lead up to the assessment, and being personally before the court, we are of the opinion that he has had his day in court, and has not been deprived of any of his constitutional rights. The owner having had an opportunity to oppose the assessment, in which he did not only object, but assisted in making, we see no valid reason for making a distinction as to a personal judgment between resident and non-resident only."

See also the case of *Maxwell v. Page*, 23 N. Mex. 356, 168 Pac. 492, 5 A. L. R. 155.

In the case of *Palmer v. McMahon*, 133 U. S. 600, 33 L. Ed. 772, the Court said:

> "The imposition of taxes is in its nature administrative, and not judicial, but assessors exercise quasi-judicial powers in arriving at the val-

ue and opportunity to be heard should be and is given over all such systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessments, and prescribes the time which and the place where such complaints may be made."

Citing *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. Ed. 569.

In the case of *Wells Fargo & Company v. Nevada* 63 L. Ed. 190, 248 U. S. 165, the general rule is laid down as follows:

"There is no want of due process of law in a tax assessment because the valuation was made without notice to the taxpayer, or without an opportunity to be heard, where the mode of enforcing the tax is by a judicial proceeding wherein process issues, and an opportunity is afforded for a full hearing, and only after there is a judgment sustaining the tax is payment enforced."

"It is no longer an open question in this state that if a party against whose property an assessment has been made, shall at any time in the course of proceeding before a conclusive judgment, be afforded by law an opportunity to contest its correctness, he is afforded due process of law."

This case seems to cover the question now involved exactly. The taxes which are attempted to be collected are only to be enforced when the judicial proceedings which were instituted in the Chancery Court of Tunica County have been finally disposed of, and the rights of all parties

adjudicated after a full and complete hearing by the court. The defendants have availed themselves of the opportunity to appear and contest each and every issue involved and occupy no different position than that of any other non-resident defendant when brought into court by judicial process, and against whom a judgment is sought or rendered.

Section 3122, Code of 1930, which is identical with Section 6887, Hemingway's Code of 1917, was construed by the Supreme Court of Mississippi in the case of *George County Bridge Company v. Catlett, sheriff and tax collector,* 135 So. 217, where the same question as to due process of law was raised as in the present case, and in passing upon that question, in which the Court said:

> "Appellant contends that the statute violates due process because it fails to provide for personal service of process on the taxpayer giving him notice and an opportunity to be heard at the equalization meeting of the board of supervisors. In considering this question, it should be borne in mind that the assessment of appellant's property was, in every respect, legal. There was no attack made upon it in the court below, nor is there any made in this court. The last clause of the statute provides that, in all actions for the recovery of ad valorem taxes (the kind of taxes here sued for) 'the assessment roll shall only be prima facie correct.' If the law made the assessment roll conclusive as to the amount of taxes due by the taxpayers, the appellant's position would raise a very grave question; but that is not true, the assessment roll is only prima facie correct. That means that the presumption of its correctness is rebuttable. *New Orleans & G. N. R. Co. v. Wal-*

den (Miss.) 133 So. 241. Therefore, when an action is brought for taxes, under this statute, the taxpayer is, of course, summoned into court by process personally served, and there given an opportunity to be fully heard, and on the trial he will be permitted to rebut if he can, the prima facie correctness of the assessment roll."

"The Supreme Court of the United States, in the case of *McMillan v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, held that a statute which gives the taxpayer the right to enjoin the collection of the tax charged against him, and to have the validity of such tax decided by the court, furnishes the taxpayer due process of law, notwithstanding the statute requires that the taxpayer gives security in advance as in other injunction suits."

In the case of *Shaw v. Bill*, 95 U. S. 1, Book 24, L. Ed. page 333, the Supreme Court of the United States in discussing what is due process of law, said:

"The nation from whom we inherited the phrase, 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. * * * * It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not and never has been considered necessary to the validity of a tax, and the fact that the laws of the states now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

The decision then refers to the fact that under the laws of Louisiana the party could probably sue or recover back taxes illegally paid, or at any rate he could prevent the collection of an illegal tax by injunction, and thereby having a right to be heard in a court of law, was due process under the Constitution.

And in the case of *Davidson v. Board of Administrators*, 96 U. S. 108, 24 L. Ed. 616, the Court said:

> "That, whenever by the laws of the State, or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice, to the person, or such proceeding in regard to the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

And in the case of *Den v. Hoboken Land & Improvement Co.*, 90 U. S. 286, 15 L. Ed. 372, the Court said:

> "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta." * * * *

and in determining what is due process, the Court said:

> "We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions, if not found to be so, we must

look to those settled usages and modes of proceeding existing under the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend that there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenue."

"It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; 8 Sup. Ct. Rep. 921; *Gallup v. Schmidt*, 183 U. S. 307, ante 213, 22 Sup. Ct. Rep. 164; *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214, 18 Sup. Ct. Rep. 925.

Wilson v. Standefer, 184 U. S. 415, 46 L. Ed. 619.

In 6 R. C. L., pages 446, 447, 451 and 452 the general rule as to the essential elements of due process of law are laid down as follows:

"The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the

nature of the case. In fact one of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College case, in which he declared that by due process of law was meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' Somewhat similar is the statement that it is a rule as old as the law that no one shall be personally bound until hehas had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard." * * *

"A party must not be deprived of his property without a judicial hearing, but the stage of proceedings at which that hearing shall take place, and the manner in which the cause of a party shall be brought before the judicial tribunal, provided it is not an unreasonably inconvenient and embarrassing one, are within the legislative power. Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

In the case of *Wilson v. Standefer*, 184 U. S. 399, 46 L. Ed. 612, the Court said:

"It is scarcely necessary to say that this court, when asked to revise proceedings in state courts, have always held that due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered."

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed.

616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Gallup v. Schmidt*, 183 U. S. 307; *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214.

"One of the fundamental principles underlying due process of law is that no person shall be deprived of his liberty without opportunity at some time to be heard in respect to the matters upon which that liberty depends, in some proceeding appropriate to the nature of the case. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings, by a court of justice having jurisdiction either in equity or in common law. Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice, is regarded as due process of law. The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts not artibrarily but in conformity with the general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. The due process clause of the Fourteenth Amendment to the constitution of the United States does not control mere forms of procedure in state courts or regulate practise therein; nor is it designed to reach errors in the administration of the laws not involving jurisdiction of the subject or of the parties."

6 R. C. L., pages 456, 457.

We have devoted some time to the discussion of the question of due process of law raised by the defendants, but do not think that this question is really or properly before the Court inasmuch as no personal judgment against the defendants, or either of them, was prayed for in the original bill, the original bill merely asking that the property seized by writ of attachment, or so much thereof as may be necessary, be sold to satisfy the debt claimed to be due, and inasmuch as under the statute these taxes are a debt that may be recovered in any manner that any other debt due by a resident or non-resident may be collected, and complainant has adopted one of the methods provided by the statute, which method has been recognized and approved by our own Supreme Court, and as said in Griffith's Miss. Chancery Practise, page 515:

> "The Chancery Court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable; or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor or persons in this state who have in their hands effect of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance."

In the present case the property was brought before the court by writ of attachment and the defendants by filing

an answer entered an appearance, and comes clearly within the rule laid down by said statute, and as set out in Griffith's Chancery Practice, supra.

In the case of *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, it was held that even without the statute, there is jurisdiction in equity to attach the property of a non-resident which cannot be reached by the ordinary process of law. It is charged in the bill and not denied in the answer that in at least one instance the defendants have denuded the land of the valuable timber and permitted same to be sold to the State for taxes, thereby depriving the state, county, and other taxing districts of their just dues, and it is evident that such was the intention in the present case and it is useless to argue that if the lands had been worth more than the taxes assessed against them, that defendants would not have permitted them to be offered for sale for taxes, and that if the State is denied the right prayed for in the original bill that a precedent will be established that any non-resident taxpayer, or resident taxpayer for that matter, can remove property upon which there is a lien for taxes and thereby leave the State, county and other taxing districts with the bag to hold and no means of protecting themselves.

> "It is a fundamental principle of jurisprudence that whoever appeals to a court of equity for relief must do so with clean hands and with an apparently clean conscience. Or, as the maxim has been sometimes very broadly stated 'he that hath committed iniquity shall not have equity.' In the words of Lord Chief Justice Wilmot: 'No polluted hand shall touch the pure foundation of

justice; and those so entering the temple will be expelled with the anathema: 'Procul, O procul esta, profani!' 'Unclean hands,' within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable—i. e., morally reprehensible as to known facts."

Applying this maxim to the present case we see such a close resemblance that we might say that this maxim was based upon the conduct of the defendants in this case. We have these defendants throughout the time the timber was standing on the land, getting the benefit and the protection of the laws of the State of Mississippi, and the very minute that it becomes advantageous they remove the valuable part of their estate, to wit, the timber, upon which there is a lien for taxes, and then say to the State: "We have had your protection in the years gone by, but now it is to our advantage to remove the property upon which there is a lien, and having removed the same without hindrance and having gotten the substance, we leave to you the shadow; collect that which is rightfully due you if you can."

It is said that a court of equity cannot be successfully invoked to assist parties in taking advantage of their own deliberate wrong and wilful misconduct.

As to the right of the attorney general to bring and prosecute this suit, we call the Court's attention to the following authorities:

Chapter 3701, Hemingway's Code of 1927, confers upon the Attorney General common-law powers, said section being as follows:

> "Attorney General and district attorneys to represent tax commission.—1. The attorney general and the several district attorneys are hereby authorized to institute or defend any suits arising out of any act or order of the tax commission or the railroad commission affecting the laws and revenues of the state, and are also clothed with such other authority as is conferred upon them at common law."

Upon that point we submit the following authorities:

> "He was the chief legal adviser of the Crown, and was entrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal in which the Crown was interested. * * * He exercised the right of enforcing public charity, possessed supervisory power over the state of lunatics, and could institute equitable proceeding for the abatement of public nuisances, which affect or endanger the public interposition. Such was the nature of the rights and duties that attached to the position at its inception, it is generally held that, in the exercise of his common law powers, an attorney general may not only control and manage all litigation in behalf of the state, he may also intervene in all suits or proceedings which are of concern to the general public.
>
> "Accordingly, as chief law officer of the state; he may, in the absence of some express legislative restriction to the contrary, exercise all

such power and authority as public interest may, from time to time, require, and may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order and the protection of public rights." 2 R. C. L. 915.

In 2 R. C. L., page 918, the rule is laid down as follows:

"Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character. * * * Moreover, he has authority to prosecute any action maintainable by it. * * * By virtue of his common law powers, however, an attorney general has a right to appear even in private litigation, if it is of such a character as to affect the interest and welfare of the general public.

"IT IS GENERALLY ACKNOWLEDGED THAT THE ATTORNEY GENERAL IS THE PROPER PARTY TO DETERMINE THE NECESSITY OR ADVISABILITY OF UNDERTAKING OR PROSECUTING ACTIONS ON THE PART OF THE STATE. THUS IT HAS BEEN HELD THAT THE DISCRETION OF THE ATTORNEY GENERAL IN DETERMINING WHAT THE PUBLIC INTEREST REQUIRES AS TO BRINGING AN ACTION AGAINST A DOMESTIC BUSINESS CORPORATION, OR ITS OFFICERS, IS ABSOLUTE, AND CANNOT BE MADE THE SUBJECT OF INQUIRY BY THE COURT."

2 R. C. L. 919.

In re *Cooperative Law Company*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, the court said:

> "The appearance of the attorney general in this proceeding, pursuant to the notice served on him by order of the Appellate Division, although criticised by the appellant, was entirely proper.
>
> "*For his ancient common law duty to represent the people called upon him to take part in a controversy in which the people are vitally concerned.*"

In the case of *State of Nebraska v. Pacific Express Company*, 115 N. W. 619, 18 L. R. A. (N. S.) 664, the court said:

> "It may be said, further, that, under the provisions of the statute specifying the power and duties of the attorney general, it is the duty of the attorney general to appear for the state and prosecute all actions in the supreme court in which the state shall be interested or a party; and he may, on his own motion, bring and prosecute for the state any suit, matter, or thing, civil or criminal, in which the state is interested, or relating to any matter connected with the executive department. Irrespective of what the powers of the attorney general might have been at common law, as the law officer of the Crown, under this provision, the power and the duty of determining when an action shall be brought by the state, or in the interests of the state in this court, devolve upon the attorney general as fully and to as great an extent as upon the governor or any other officer of the executive department. When, in the exercise of the powers thus conferred upon

him by the Constitution, and the law, the attorney general determines that the interests of the state require an action to be brought in this court, no question can arise as to his authority to institute or maintain the suit, if it is a matter in which the state is interested or relating to the executive department. * * * * This is a well-recognized power and duty of such an officer both in England and in this country."

"The attorney general is a proper party to decide when he shall attend the trial of any party accused of crime, and assist in the prosecution, and that the attorney general or his assistants are the proper parties to decide when it is to the best interest of the state to institute and prosecute any case."

Ex rel, Miller vs. District Court, 19 N. Dak. 819; 124 N. W. 417.

Am.-Eng. Anno. Cas. 1912D, 935.

In the case of *People vs. Ballard,* 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, the court said:

"We think that the question as to what the public interest requires is committed to the absolute discretion of the attorney general, and that it cannot be made the subject of inquiry by the courts. If he abuses the great power entrusted to him, a remedy may be found in his removal from office, or in the election of a successor worthy of the high position."

In the case of *Miller vs. District Court,* supra, the court said:

"The highest courts in New York and Montana hold that the attorney general is the proper

party to determine when the public service requires his taking part in prosecuting actions on the part of the state.

"As the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interest may, from time to time, require. He may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.

"The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement, is, in no proper view, a limitation upon, nor does it exclude, the general authority of the attorney general upon the same subject. We have numerous instances where particular duties are expressly imposed upon the attorney general, yet it is clear that the attorney general has the right, in virtue of his office, to cooperate with or act independently of that official in all cases where public interests justify it."

State ex rel Young v. Robinson, 101 Minn. 277, 112 N. W. 269; 20 L. R. A. (N. S.) 1127.

And as said by the Supreme Court of Mississippi in the case of *Nickey, et al v. State*, 145 So. 630:

"As we view it, in order to hold that the state had no right to bring this suit, much of what was decided in that case would have to be overruled. We have not a case here where the state has interferred with the collection of these taxes by the tax collector through the statutory scheme. It

was agreed in the record that the tax collector abandoned the statutory scheme, and agreed for the state to bring this suit. The suit is the result of cooperation between the attorney general and the tax collector. It was thought by them that the taxes might be collected by this suit, but probably could not be by the tax collector. This is not a case where the state has pushed the tax collector out of its way, and taken charge of the situation. It is therefore unnecessary to decide in this case how far the state can go in interfering with the tax collectors in the performance of their statutory duty in the collection of taxes. If the state must wait until the tax collectors have exhausted the statutory remedies for the collection of taxes section 3122, declaring taxes a debt for which suit may be brought, would be utterly useless. To illustrate, the tax collector pursued the statutory scheme; the lands of the taxpayers are knocked off to the state for their taxes, costs and damages. The result is that the taxes are paid, and the taxpayer owes no taxes for which suit may be brought."

Appellants not having furnished appellee with a copy of their brief in this case, we have been compelled to prepare this brief without reference to the authorities relied upon by them in support of their contentions in this case.

Respectfully submitted,

GREEK L. RICE, Attorney General,
E. C. SHARP,
R. H. KNOX,
DULANEY & BELL,
Associate Counsel.

I hereby certify that I have this day mailed, postage prepaid, to Mr. W. E. Gore, of Counsel for Appellant, at Jackson, Mississippi, care of State Tax Commission, a true and correct copy of the above and foregoing brief for Appellees.

This the 2nd day of December, 1933.

E. C. Hart

Associate Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, ET AL.,

VS.

STATE OF MISSISSIPPI, EX REL,
GREEK L. RICE, Attorney General.

SUPPLEMENTAL BRIEF FOR APPELLEE

It will be borne in mind that this suit was begun by the attachment of lands of the defendants in the State of Mississippi; and if the defendant had not appeared in the case, we certainly would not contend that the Court in this case could consistently with the Constitution enter a personal decree against them. Had defendants not entered their appearance we would have requested, as prayed for in the bill, that the Court enter a decree directing that the property attached be sold for the payment of the debt claimed. Certainly no question of due process can now arise in regard to cases where without personal service the property of non-residents is seized and subjected to the payment of a debt. Our statute provides for such proceedings and such cases are so common both in our Circuit Court and in our Chancery Court that one must engage in the practice of law to a ripe old age without finding

it necessary to go to the decisions of our high Federal Court for authority to justify such proceedings. The Mississippi statute relating to attachments is very mild in comparison with the Delaware statute which requires that the non-resident, before he can defend an attachment suit, must give bond or other security for the payment of such judgment as may be rendered against him in the case. Of course, in Mississippi, he may give bond and secure a release of the attachment, but in Delaware, he must give the security, otherwise he will have no standing in court. The validity of this statute was challenged in the case of *Owenby vs. Morgan*, 266 U. S. 94, 65 L. Ed. 837, in which it was contended that the statute deprives non-residents of due process of law. The Court held that such was not true in any case and particularly in the case then under consideration where it appeared that the defendant had acquired the property right and absented himself from the State after the practice was established and hence with notice that his property situated there would be subject to disposition under an attachment by the very method that afterwards was pursued and the Court said further:

> "The property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed ex necessitate to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practical method that reasonably may be adopted."

However important it may be that the State should provide methods of procedure whereby their citizens may

collect debts owing to them by those out of the State, obviously it is of much more importance that the state, itself, shall have every reasonable remedy for the collection of debts due it by property owners, whether resident or non-resident, so that the very life of the State may be preserved and its function of protection of the property of such owners continue. Nor would anyone doubt that a remedy which is deemed reasonable for the collection of a private debt must so much the more be deemed reasonable for the collection of debts due the State. It will be remembered that the attaching creditor is not required to have a personal judgment against a debtor before he can proceed by attachment. It is only necessary that the attaching creditor shall claim that there is a debt owing to him by the defendant. He may claim a liquidated debt such as a promissory note may evidence, or he may claim an unliquidated debt and in either event the Court would determine in the attachment suit whether such debt existed and if it so found, it would subject the attached property to the claim so found, but of course would render no personal judgment or decree unless there was an appearance or personal service. So the State may proceed by attachment and in this instance is so proceeding for the collection of a debt arising from its statutes levying taxes and now liquidated by reason of the fixing of the tax rate, either by the statute or in the manner provided by the statute and by reason of the valuation of the property by proceeding under the statute. It was entirely proper for our highest Court to say that no personal judgment can be rendered without personal service of process, but this statute in no way embarrassed the Supreme Court in afterwards holding that a

sovereign state could subject any property in its jurisdiction to the payment of any debt due it by the property owner.

In the *Frick case* (268 U. S. 473, 69 L. Ed. 1068) the Court says:

> "A State may so make its tax laws as to reach every object which is under its jurisdiction."

The Court did not then have under consideration a specific tax on specific property, but the Pennsylvania succession tax, collectable out of the whole estate within the State of Pennsylvania. So far as we know no State has adopted a succession or estate tax whereby the separate items of property are valued and taxed separately, and we are not interested in considering whether or not such an estate tax would be valid. It is clear however under the Frick case and other cases that a State may so frame a tax law that the whole of the property taxed may be liable for the entire tax. If Mississippi can do this with its estate tax, it can hardly be doubted that it would be entirely within the Constitution to enact a general tax statute whereby all of the property of a given taxpayer within the jurisdiction of the State would be liable for all of the annual taxes required of such taxpayer, and little, if anything more than this, is done by our statute which makes our taxes a debt.

In the early case of *Den v. Hoboken Land & Improvement Co.*, 18 Howard 272, 15 L. Ed. 372, involving a distraint for taxes due the United States, the Court said:

> "The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution."

The main reliance of the defendant appears to be on the case of *Dewey v. Des Moines*, 173 U. S. 193, 43 L. Ed. 665, and it seems that they construe the opinion in that case as holding that without personal service a State cannot subject to the payment of a tax, anything except the property against which the tax was levied, although the taxpayer may have other property within the jurisdiction of the State. With all deference for the views of our able and learned opponents, who evidently have given much study to this case, we submit that they misconstrue the holding in the Dewey case and seek to give to it effect which the United States Supreme Court has considered and declined to give.

In the case of *Scottish Union and National Insurance Co. vs. Bowland*, 196 U. S. 612, 49 L. Ed. 619, it appeared that the insurance company for a number of years had maintained bonds with the insurance department of the State under a state law requiring them to do so and as a condition to doing business in the State. These bonds were subject to taxation and under provisions of the state statute, steps were taken to assess the bonds for taxes, not only for the current year but for several years preceeding. After the proceedings were begun and before the assessment became final for the current year, the company took the

bonds out of the State and substituted therefor tax-exempt bonds of the United States which were left on deposit with the insurance department. When the assessment became final, the tax collector seized the United States bonds and sought to have them sold to satisfy the taxes on the bonds which had been withdrawn. The insurance company obtained an injunction against the proceedings by the tax collector. In the United States Supreme Court, it was held that the section of the Ohio statute authorized the distraint of goods to satisfy taxes lawfully levied within the county and state and said:

> "This method of collecting taxes is one of the most ancient known to law, and frequently received the sanction of the Courts." (Authorities cited).
>
> "There is nothing in the exemption of government bonds from taxation which prevents them from being seized for taxes due upon non-exempt property. We have held that the taxes were lawfully assessed. The statute authorizing a distraint gave the right to proceed against personal property within the jurisdiction of the State. The taxes were lawful, and the property belonging to the foreign corporation which could be seized within the authority of the State might be taken under this statute, and we do not perceive that any constitutional right is violated by seizing this property under such circumstances."

In holding that the injunction should not have been issued because of any question of personal liability of the

insurance company to a judgment in an action brought to recover the amount of the taxes, the court said:

> "If there is no personal liability for these taxes,—a point which we do not feel called upon to decide,—it is perfectly clear, that, if service could be had which would make a personal judgment good, the company could set up its defense to an action at law and there is no necessity to resort to a court of equity for relief. It will be presumed, if the company is right, no personal judgment will be rendered against it, and, if its theory of the controversy is correct, no such judgment could be lawfully rendered."

We think that our contention that a sovereign state may without personal service make a valid assessment of property within the state belonging to a non-resident and may thereafter subject not only the property assessed but also any other property of the non-resident within the jurisdiction of the State to the payment of such tax, is fully supported by the case of *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701. We respectfully submit that the holding in the Bristol case eliminates entirely any question of lack of due process of law from the case at bar. It appears from the opinion in this case that Sophia M. Bristol was a resident of the State of New York and owned property in the State of Minnesota. She died and her will was probated first in New York and then in Minnesota and the executor qualified in the latter state. For about ten years preceeding her death, she was not in the State of Minnesota except temporarily and the whole time she spent in that State during that period was about one year, but she had an agent in Minnesota who represented her by

collecting certain notes held by him for her and due from citizens of Minnesota. For the years 1883 to 1894, personal property taxes were assessed against her by the taxing officers of the city of Killwater, Minnesota, and Washington County, Minnesota, on the personal property of the said Sophia Bristol in that city and county. A claim was filed in Minnesota against her estate for the amount of these taxes and the Court found that the taxes had all been fairly assessed on a fair valuation of the personal property of the said Sophia Bristol for each of said years and further found that Washington County was entitled to judgment in the amount of the taxes and penalties. On appeal to the United States Supreme Court, the opinion was handed down by Chief Justice Fuller and the following are excerpts from the opinion:

"The judgment amounted to the allowance of the claim payable in due course of administration out of the assets of the estate within the jurisdiction of the Probate Court. This was so notwithstanding the domicile of the testatrix and of her executor was in the State of New York and that that was the place of principal administartion; and that the person charged therewith was the same."

"Accepting the views of the State Court in relation to the state statute and proceeding thereunder, and concluding that the Constitution of the United States did not operate to prohibit the power to tax these investments, it follows that the Probate Court did not err in sustaining the validity of the taxation; but it is further contended that as Mrs. Bristol was a non-resident, the power should be exercised against the very property tax-

ed; that these assessments did not constitute judgments in personam; and judgment against her estate could not, therefore, be rendered upon them. The state statute provided that taxes should be preferred to ordinary debts, and, as has been seen, the Supreme Court has decided that 'for the purpose of proof and payment out of the estate, a personal tax is a debt'. The Court, for that purpose, so treated taxes, but not as being debts in the usual acceptance of the term. The obligation to contribute to the suport of government is not dependent on contract, but on the exercises of the public will as demanded by the public welfare."

It further appears from the opinion, that under the laws of Minnesota, when personal property taxes became delinquent, a warrant could be issued for the distraint of the goods and chattels of the taxpayer, for personal judgment on service of citation and also provided for proceeding against non-residents by attachment and publication of notice, and the Court said further:

"Thus, it appears that upon the return of the delinquent tax list, the amount of the tax could be collected by the distraint of goods and chattels, or by proceeding by attachment and publication, judgment on which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained the defendant would not be cut off from any com-

> petent defense, as the delinquent list would not necessarily be held to be conclusive. In this case, no defense upon the merits appears to have been relied on except the want of service."

Just as in the case at bar, the case of *Dewey v. Des Moines* was cited by counsel for the Bristol estate and the Court said that that case was not contrary to the holding, and explained:

> "What was ruled there was that a citizen of one State cannot be cast in a personal judgment in another State on an assessment levied there on real estate for a local improvement, without service on him, voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

We respectfully submit that on the question of due process, the holdings in the Bristol case are conclusive on the defendant and the contentions of our learned opponents. In fact, if their ages did not prevent the supposition, we might easily be persuaded that they were of counsel for the Bristol estate in that case. For, was it not contended that the Dewey case forbade the collection of the delinquent taxes? Was it not also contended that the taxes should be collected only from the specific property against which the taxes were assessed? Again, was it not contended that these assessments, made annually, over a period of about ten years during which Mrs. Bristol was living, constituted void personal judgments for the reason that there was no personal service of process?

All of these contentions were made on behalf of the

Bristol estate as they are now made on behalf of the Nickey brothers. All of them were considered and discussed by the Court and held to be without merit. Of course in the Bristol case all of the property of the non-resident decedent was in a sense in the custody of the Court by reason of the pending administration and there was no need of a distraint or an attachment. No distinction is to be drawn on this account. It was merely a question of realizing against the estate of a decedent on a claim for taxes which arose from year to year against the decedent during her lifetime and it cannot be doubted that if the taxing authorities had been active in an effort to collect the taxes during Mrs. Bristol's lifetime, whether by distraint or attachment or any other proper procedure, the answer of the Supreme Court to the contentions made would have been the same.

We respectfully submit, therefore, the judgment of the Supreme Court of Mississippi should be affirmed in this cause.

GREEK L. RICE, Attorney General,

DULANEY & BELL,

E. C. SHARP,

R. H. KNOX,

Of Counsel.

I hereby certify that I have this day mailed, postage prepaid and properly addressed to Messrs. Gore & Gore, Jackson, Mississippi, care of State Tax Commission, Attorneys for Appellant, a true copy of the above and foregoing Supplemental Brief.

This the second day of December, 1933.

E. C. SHARP,

Associate Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, ET AL.,

Appellants,

VS.

STATE OF MISSISSIPPI,

Appellee.

BRIEF FOR APPELLEE

EXPLANATION

Inasmuch as counsel for the State have already filed a brief and a supplemental brief, I deem it necessary to state to the Court that the Clerk of this Court notified counsel for appellee that this case would be called for argument during the week beginning December 11th. At the time said brief and supplemental brief were filed counsel for appellant had not given counsel for appellee a copy of his brief.

On the 4th day of December, counsel for appellant did deliver an incomplete typewritten carbon copy of his brief

to counsel for appellee. He has not to this date, December 5th, 1933, delivered us a completed printed copy.

PRELIMINARY STATEMENT

This is an appeal from a decree rendered by the Supreme Court of the State of Mississippi wherein said Court affirmed in part a decree of the Chancery Court of Tunica County.

The State, by its Attorney General, brought suit by attachment in the Chancery Court against appellants for ad valorem taxes, drainage district taxes and fees due the tax collector of said county. The Court found in favor of the State on all items. The Supreme Court affirmed the finding of the Chancellor insofar as the claim for ad valorem taxes were concerned, but reversed and dismissed the bill insofar as the drainage district taxes and the fees due the tax collector were concerned. The only question involved in this case is the ad valorem taxes.

STATEMENT OF THE CASE

The appellants herein own two tracts of land in Tunica County, Mississippi. Each of these tracts were assessed for taxes for the year 1928. On one of said tracts the taxes were paid before they were delinquent. On the other tract, the taxes had become delinquent and were unpaid.

Acting under the provisions of what is now Section 3122, Code of 1930, the Attorney General for and on behalf of the State of Mississippi filed a bill in the Chancery Court of Tunica County, and alleged that the defendants in

said cause owned a tract of land on which the taxes were past due or delinquent, and that it also owned other lands in said county on which the taxes had been paid for the year 1928.

The bill alleged that the defendants were cutting and removing the timber from the land on which the taxes had not been paid, and if permitted to continue so to do that the lands denuded of its timber would not be worth the ad valorem taxes then due on said land.

The bill prayed for an injunction to restrain the cutting of the timber. However, it does not appear that the injunction ever issued. It also prayed that a writ of attachment issue. This writ was issued and was levied on all of the lands described in the original bill. By order of the Court the defendants gave a surety bond in a sum equal to double the amount of the taxes, conditioned to pay any decree that the Court might render against them, and released all of said lands from said attachment.

The Court below found "that the allegations of the original bill herein are supported by the proof, and that complainants are entitled to the relief prayed for" (r. 47), and that the tract of said land had been legally assessed and was liable for the ad valorem taxes, the drainage district taxes and the fees due the sheriff and tax collector, as alleged in the bill, and gave a decree against the defendants and the surety on the bond to release the property from the writ of attachment for each of said sums.

In reference to the property for ad valorem taxes, the

Supreme Court held (r. 51) that "the assessed value is the basis of the debt declared by the statute. It is the valuation fixed by the taxing authorities upon which the tax levy is to be made. Before that valuation can be conclusively fixed and become the basis of the debt for which an action may be brought, the tax payer must have his day in court on personal service of process * * * * The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the Court and stood exactly like they would had they been residents of the State and had been personally served with summons."

In reference to the claim for drainage district taxes (r. 58) the Court held that "Section 3122 of the Code does not cover drainage taxes. It only covers state, county, municipal and levee board taxes, whether ad valorem, privilege, excise, income or inheritance." The Court further held: Under our drainage district taxes the assessments are a charge or lien on the lands against which they are assessed. They do not constitute a debt against the landowner and cannot be enforced as such. No other property of the land owner can be subjected to their payment."

In reference to the claim for fees, costs, etc., due the tax collector, the Court held that under the law he had not earned such fees and was not entitled thereto. (r. 61)

The Court affirmed the decree of the Chancery Court insofar as the claim for ad valorem taxes was concerned, but reversed the decree in reference to the drainage dis-

trict taxes and the fees and costs due the tax collector, and dismissed the bill as to these items.

STATEMENT OF POINTS

The argument for the appellee will be made under the following headings or points, to-wit:

POINT I.

This Court is without jurisdiction in this case

(A) Because the Federal questions here complained of were not raised in the Court below.

(B) Because the Court held that the proceedings in Court and not the tax assessment fixed the personal liability of the non-resident tax payer. This does not involve a Federal question.

(C) Because the Federal questions attempted to be raised here have been foreclosed and precluded by previous decisions of this Court.

POINT II.

The decree and opinions of the Supreme Court of Mississippi do not take appellants' property without due process of law in violation of Article 14 of the Constitution of the United States. (See appellants' Point No. 1 R. 89)

POINT III.

The decree and opinions of the Supreme Court of Mississippi do not deny the non-resident appellants privileges

and immunities possessed by citizens of the State in violation of Section 2, Article 4, and Article 14 of the Constitution of the United States. (Appellants' point II. r. 90)

POINT IV.

The construction of what is now Section 3122, Code of 1930, was for the Supreme Court of the State of Mississippi and this Court is bound thereby unless the statute as construed violated the Federal Constitution. (Appellants' Point II, second paragraph, r. 90).

POINT V.

The question of the jurisdiction of the Chancery Court is a question for the State Court to determine, and this Court is bound thereby.

BRIEF AND ARGUMENT.

POINT I (A).

THE FEDERAL QUESTIONS HERE COMPLAINED OF WERE NOT RAISED IN THE COURT BELOW.

At a former day of this term of the Court it entered an order pretermitting the determination of its jurisdiction until a hearing of this cause on its merits. I will, therefore, briefly discuss the jurisdiction of this court in the case at bar.

The law is well settled that unless the federal questions are sufficiently raised in the State Courts that this Court does not have jurisdiction to determine such questions.

Appellants in the Court below filed assignments of errors, assigning seventeen alleged errors committed by the trial court. (r. 51).

Assignments No. 1 to 16, both inclusive, are in reference to the admission or exclusion of evidence in the trial of said cause.

Assignment No. 17 is as follows:

> "The court erred in rendering and entering each and every part of the decree against the defendants and the surety on their bond.'"

Rule 6 of the Revised Rules of the Supreme Court of Mississippi, adopted in 1918, the last rules adopted by said Court, is as follows:

> "RULE 6, ASSIGNMENT OF ERRORS. 1. On or before the return day the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be argued. * * * *
>
> "2. No error not distinctly assigned shall be argued by counsel except upon request of the court, but the Court may, in its option, notice a plain error not assigned or distinctly specified."

It is clear that assignment of error No. 17 is the only one that raises any question except in reference to the evidence, and it certainly cannot be said that this assignment raises any Federal question, or any other question except in a vague, indefinite and general way. It does not "set out separately and particularly each error asserted." The trial Court would, therefore, have been warranted in not con-

sidering said assignment. Said assignment is not sufficient to raise a Federal question so that it may be decided or determined by this Court.

It appears, however, that the Supreme Court did not follow the requirements of said rule, and Judge Anderson in the opinion of the Court (r. 55) states as follows:

> "The case presents the following questions for decision:
>
> "1. Whether the lands were legally assessed for their ad valorem taxes.
>
> "2. Whether section 3122, Code of 1930, declaring every lawful tax a debt, for which action may be brought, violates the due process provisions of the state and federal constitutions.
>
> "3. Whether drainage district taxes come within the provisions of that statute.
>
> "(Fol. 93) 4. Even though drainage district taxes do not come within the provisions of that statue, whether or not, under the allegations of the bill, the state had the right to subject other property of appellants to the payment of such taxes than the property against which they are assessed.
>
> "5. Whether the state has the right to recover the statutory fees, costs and damages chargeable against lands delinquent for their taxes, where they have been advertised for sale by the tax collector, but not sold.
>
> "6. Conceding that the statute includes the taxes involved, whether or not the state had

> the right to bring this suit before the tax collector of the county had exhausted the statutory remedy provided for the collection of such taxes."

At page 6 of statement as to jurisdiction filed by appellant in this Court, he concedes that question Number I was determined against his contention and that the decision of the Supreme Court foreclosed any consideration of that question in this Court. Questions 3, 4, and 5, which are in reference to drainage district taxes and the fees and costs and damages charged against the lands in favor of the tax collector were determined in favor of appellants, and these questions are not involved in this case.

Question No. 6 was determined against appellants. However, the determination of this question is not raised here, and if it were, the decision of the State Court would preclude this Court from determining the question.

Question No. 2 was determined against appellants, the Court holding that the personal liability of the appellants could only be determined after personal service of process or appearance of the appellants in Court (r. 57); that is, that the personal liability could be fixed only after a hearing, and that the due process requirements were met by a hearing after summons or appearance.

There is nothing in the assignments of error nor in the statement of questions by the Court that in any way indicates that the question of discrimination was raised or mentioned in the Supreme Court of Mississippi.

After said opinion was delivered by the Court, counsel

for appellants filed an elaborate suggestion of error. (r. 73). However, he does not in any of the numerous sggestions of error complain that any question presented to the Court on the previous argument was omitted by said Court. ~~He does not complain that he is being deprived of his property without due process of law.~~ It, therefore, conclusively appears that the question of the violation of Section 2, Article 4, of the Constitution, and of Article 14, insofar as it guarantees equal rights and privileges was not raised or decided by the Supreme Court of Mississippi.

This Court has no jurisdiction unless it appear affirmatively not only that the Federal question was presented for decision but that its decision was necessary to a determination of the cause, and that it was actually decided.

The assignment of errors in this case does not mention any constitutional provision. In other words, from reading the assignment of errors it cannot be determined that appellant is relying upon his constitutional rights. Not only this, but after the Supreme Court had decided this case, appellant filed a suggestion of errors and enumerates eleven separate and distinct alleged errors. ~~However, even in this suggestion of error he does not raise the question as to whether or not he was denied due process of law.~~ Assignment No. 11, ~~the only one mentioning appellant's constitutional rights~~ does state as follows:

> "The Court erred in denying the appellants the equal protection of the laws as provided in the Fourteenth Amendment to the Federal Constitution, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'."

See Brief No 2
D D No 72

In other words, he does claim that Section 14 is violated, but *he does not complain that the due process clause of this section is violated*, but bases his constitutional rights upon the "equal protection" guaranteed by this section.

It, therefore, conclusively appears that in the Court below complainant never complained of the violation of the due process clause of the Constitution.

In *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. ed. 665, this Court holds as follows:

> "In *Oxley Stave Co. v. Butler County*, 166 U.S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to re-examine the final judgment of the state court upon that matter. See also *Levy v. Superior Court of San Francisco*, 167 U. S. 175; *Kipley v. Illinois*, 170 U. S. 182."

C. & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed 127;

Parker vs. McLain, 237 U. S. 469, 59 L. ed. 1051;

First National Bank vs. City Council of Estherville, 219 U. S. 341, 54 L. ed. 223;

Bachtel vs. Wilson, 204 U. S. 36, 51 L. ed. 357;

Leathe vs. Thomas, 207 U. S. 93, 52 L. ed. 118;

White River Lumber Co. vs. State of Arkansas, 279 U. S. 692, 73 L. ed. 903;

Bothwell vs. Buckbee-Mears Co., 275 U. S. 274, 72 L. ed. 277.

POINT I (B).

THE COURT HELD THAT THE PROCEEDINGS IN COURT AND NOT THE TAX ASSESSMENT FIXED THE PERSONAL LIABILITY OF THE NON-RESIDENT TAX PAYER. THIS DOES NOT INVOLVE A FEDERAL QUESTION.

The Court held that what is now Section 3122, Code of 1930 furnishes a basis for imposing a personal liability for taxes on property in Mississippi. It further held that this personal liability could be fixed only as provided in said section; that is, by a personal service of process or by the personal appearance of the non-resident tax payer. In the case at bar, the State was proceeding against the property of the appellants in this State for taxes that were past due and delinquent. It had a right to do this.

In the case of *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. ed. 665, the court holds that "the power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a non-resident." This case certainly does not hold that the State cannot reach the property of a non-resident which is located within the State for taxes due the State. The procedure

instituted by the Attorney General was to subject the property of the non-resident appellants within the state to the payment of the debt due for taxes. The non-resident appellants came in and appeared by their answer, and not only did they appear, but by their bond to release the property attached they released the property of the appellants within the state. In other words, the bond filed by the non-residents and their surety was taken by the Court in lieu of the lien created by the writ of attachment against the property of appellants.

The complaint here is that the state is taking property other than the property assessed for the payment of the taxes. The giving of the bond and the release of the property pretermitted this question. The Court held that after the appearance and the giving of the bond the appellants "stood exactly like they would had they been residents of the State and had been personally summoned."

POINT I (C).

THE FEDERAL QUESTIONS ATTEMPTED TO BE RAISED HERE HAVE BEEN FORECLOSED AND PRECLUDED BY PREVIOUS DECISIONS OF THIS COURT.

In the case at bar the Court held as follows:

> "The assessed value is the basis of the debt declared by the statute. It is the valuation fixed by the taxing authorities, upon which the tax levy is to be made. Before that valuation can be conclusively fixed, and become the basis of a debt for which an action may be brought, the taxpayer must have his day in court on personal service of

process. The last clause of this statute furnishes such a hearing in providing that the assessment roll shall only be prima facie correct. If it is only prima facie correct, that means, of course, the taxpayer is given an opportunity to show the correct valuation; and in attempting to do so, the same considerations are taken into account as would have been by the board of supervisors at its equalization meeting where the taxpayer had challenged the assessment. The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the Court, and stood exactly like they would had they been residents of the state, and had been personally served with summons.

"It is true that in the Delta Pine Land Compnay case, and in the George Co.-Bridge Co. case, the taxpayers had, before suit was brought, appeared before the board of supervisors and contested their assessments. We are unable, however, to see how that, on principle, differentiates this case from those cases. In other words, in those cases the taxpayers had two hearings on the issue of the valuation of their property, and in the case at bar the taxpayer had only one hearing. Due process requires only one hearing—not two.

"Section 3122 of the Code does not cover drainage district taxes; it only covers state, county, municipal and levee board taxes, 'whether ad valorem, privilege, excise, income or inheritance.' The state contends, however, that because of the following facts it had the right to fix the drainage taxes as a charge on the other lands owned by appellants, which were attached. Those facts

were that appellants were denuding their lands in the drainage district of their timber, which constituted their principal value; that they would continue to do so until there would be nothing left except the land, which would be insufficient in value to pay the other taxes and the dainage assessment against them for 1928, that when the timber was removed appellants would permit the lands to sell to the state for state and county taxes, and there would be nothing left to pay the drainage assessments; that under the law the drainage assessments were a lien, not only against the land, but the timber standing thereon. The state's contention is that under the law the fact that appellants were destroying the timber which was part of the security for the payment of the assessments, gave it the right to resort to other property owned by appellants for the payment of the assessments, although such assessments are not debts for which a personal judgment may be recovered." (r. 57-58).

In *George County Bridge Company vs. Catlett*, 161 Miss. 120, text 131, the Court in construing the statute in controvesy held as follows:

"Appellant contends that the statute violates due process because it fails to provide for the personal service of process on the taxpayer giving him notice and an opportunity to be heard at the equalization meeting of the board of supervisors. In considering this question, it should be borne in mind that the assessment of appellant's property was, in every respect legal. There was no attack made upon it in the court below, nor is there any made in this court. The last clause of the statute

provides that, in all actions for the recovery of ad valorem taxes (the kind of taxes here sued for) 'the assessment roll shall only be prima facie correct.' If the law made the assessment roll conclusive as to the amount of taxes due by the taxpayers, the appellant's position would raise a very grave question; but that is not true, the assessment roll is only prima facie correct. That means that the presumption of its correctness is rebuttable. *New Orleans & G. N. R. R. Co. v. Walden* (Miss.) 133 So. 241. Therefore, when an action is brought for taxes, under this statute, the taxpayer is of course summoned into court by process personally served, and there given an opportunity to be fully heard, and on the trial he will be permitted to rebut if he can, the prima facie correctness of the assessment roll.

"The Supreme Court of the United States, in the case of *McMillen vs. Anderson*, 95 U. S. 37, 24 L. ed. 335, held that a statute which gives the taxpayer the right to enjoin the collection of the tax charged against him, and to have the validity of such tax decided by the court, furnishes the taxpayer due process of law, notwithstanding the statute requires that the taxpayer give security in advance as in other injunction suits."

These decisions clearly and unequivocally hold that when a tax payer is sued under the provisions of said section he is entitled to have his day in court; that is, he must be summoned by personal process or he must appear in court for answer or other pleading and submit to the jurisdiction of the Court. In the George County Bridge Company case personal service was had. In this case, defendants answered the bill and gave a bond to release the prop-

erty from the writ of attachment. Of course, the Court below could not have given a personal judgment against the appellants if they had not been personally served or if they had not appeared and answered said bill.

Appellant contends that the personal liability of the non-resident appellants was fixed by the assessment. This is not true. The statutes of the State do fix the liability for taxes due. However, as held by the Court, in this case the taxpayer had a right to make the same defense that he could have made at the time the property was assessed.

Assuming for the sake of argument that the assessment of taxes by the State of Mississippi against lands of appellants was a personal judgment against the appellants, yet they cannot complain that they were not afforded due process of law by said statute as construed by the opinions of this Court.

In *American Surety Company vs. Baldwin*, 287 U. S. 156, 77 L. ed. 231, a judgment was given without notice against the surety on an appeal bond. The surety company contended that the judgment was void because it was rendered without due process of law. The Court said as follows:

> "It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against

it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9. Compare *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133, 59 L. ed. 501, 35 Sup. Ct. Rep. 279; *Bianchi vs. Morales*, 262 U. S. 170, 67 L. ed. 928, 43 S. Ct. 526. See also *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596, 597, 75 L. ed. 1289, 1296, 1297, 51 S. Ct. 608; *Coffins Bros. v. Bennett*, 277 U. S. 29, 72 L. ed. 768, 48 S. Ct. 422. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law."

A re-hearing of the above styled cause was denied on January 9th, 1933.

In *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373, 77 L. ed. 1265, the Court quoted and approved the opinion just cited, holding as follows: "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry judgment. *American Surety Company vs. Baldwin*, supra; *York vs. Texas*, 137 U. S. 15, 34 L. ed. 604."

Our Court holds that under said statute the taxpayer has a right to his day in Court and that he can make any and all defenses in said court that he could have before the original assessing body. The appellants are, therefore, precluded from raising this question by the prior decisions of this Court, it being well settled that a construction of a state statute by the state court is binding upon and will be upheld by this Court.

The construction placed upon a state statute by the highest court of the State must be accepted by the United States Supreme Court on review as though it had been specifically expressed in the statute.

A. T. & S. F. Ry. Co. vs. Railroad Commission, 283 U. S. 380, 75 L. ed. 1128;

Saltonstall vs. Saltonstall, 276 U. S. 260, 72 L. ed. 565;

Keith vs. Johnston, 271 U. S. 1, 70 L. ed. 795;

Swiss Oil Corporation vs. Shanks, 273 U. S. 407, 71 L. ed. 709;

Appleby vs. City of New York, 271 U. S. 364, 70 L. ed. 992.

POINT II.

THE DECREE AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI DO NOT TAKE APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF ARTICLE 14 OF THE CONSTITUTION OF THE UNITED STATES.

The question of due process has been argued under

Point I (C), immediately preceding this point, and the argument will not be repeated. See also page 19, et seq., brief for appellee heretofore filed in this case.

Under the laws of Mississippi the State has two remedies for the collection of taxes due. One is, under the provisions of Section 3247, et seq., Code of 1930, which authorizes the sale of the property for taxes. The other is, by suit as authorized by Section 3122, Code of 1930, here in controversy.

In the case of *Carriere Lumber Company vs. Quitman County*, 156 Miss. 396, the Supreme Court of this state held that where the state pursued its remedy under the provisions of Section 3247, Code of 1930, that it could not then pursue the remedy afforded by said Section 3122. The rule would be the same when the State follows the procedure provided for in Section 3122; that is, when the State proceeds under said section by suit, it relinquishes its lien for taxes and the right to sell as provided by law. In other words, the State has the right to elect its remedy. In this case it elected to proceed against the property of appellants by attachment. The State is bound thereby and could not afterwards advertise and sell the land under its statutory lien for taxes.

Appellants in this case now concede that the State had a valid lien for the ad valorem taxes on the tract of land on which the taxes had not been paid, and make no complaint to the subjection of this tract of land to the payment of taxes. However, when the suit was instituted, an attachment writ was levied against the land on which the taxes

had not been paid as well as the land on which the taxes were paid. The appellants by filing the bond released all of said property from said attachment writ, thereby releasing all liens and claims the State had against the land on which the taxes were not paid. He admits that the State had a lien against this land for the taxes. He does not deny the validity of the attachment writ. By the giving of his bond he has released the state's lien. In other words, the bond stands in lieu of the lien.

The Court does not hold that the assessed value of the land was a personal liability of the defendants, but does hold that the assessed value "is the basis of the debt declared by the statute." The Court further holds:

> "The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the court and stood exactly like they would had they been residents of the state and had been personally served with process."

Said Section 3122 provides that the taxes due shall be a debt due by the owner. As to residents of this State, this statute has been upheld and applied in the case of *George County Bridge Company vs. Catlett*, 161 Miss. 120. Under the opinion of the Supreme Court of Mississippi in this case the assessment is the basis of the debt, but personal liability cannot be fixed and determined without personal process or the appearance of the taxpayer in Court.

Section 173, Code of 1930, provides as follows:

"The chancery court shall have jurisdiction of

attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance."

This section is the same as Section 536, Code of 1906, Section 293, Hemingway's Code of 1917, and was in effect at the time of the institution of this suit, and said suit was brought under and by virtue of said provisions.

In *Hall Commission Co. vs. Foote*, 90 Miss. 422, the Court held that under the provisions of Section 536, Code of 1906, providing for attachments in Chancery against non-resident debtors, a court of equity may, where a non-resident defendant has appeared and answered the suit render a personal decree against him for the balance of complainant's debt not realized by the sale of the attached property.

In *Branham vs. Drew Grocery Co.*, 145 Miss. 627, the Court, after quoting Section 536, Code of 1906, now Section 173, Code of 1930, held as follows:

"We think the amendment to this section authorized the court, when the defendant appeared

and contested the attachment suit, to enter a judgment in personam.

"In the case of *John E. Hall Commission Co. v. Foote, et al*, 90 Miss. 422, 43 So. 676, cited in the main opinion, it is held that the court may render such personal judgment when the defendant has appeared and contested the liability.

"We think there is no good reason to hold, where the defendant has appeared and submitted himself to the jurisdiction of the court, and contested with complainant the liability, and where it is manifest, after a complete hearing on such personal appearance, that he does owe the complainant that such complainant should be denied the right to recover."

In the trial Court the appellants here contested the entire liability. They contested the validity of the assessment and contended they did not owe any tax.

In *Traveler's Insurance Co. vs. Inman*, 157 Miss. 810, text 821, the Supreme Court of this State again holds that said section authorizes a judgment upon the demand there involved when a person has appeared in a suit in attachment in Chancery.

In the case of *York vs. State of Texas*, 137 U. S. 15, 34 L. ed. 604, the facts as stated by the Court show that the State of Texas brought suit against York, a non-resident of Texas; that no valid service of process was had on York; that after suit was filed the defendant appeared by his counsel and filed a special plea "challenging the jurisdiction of the court on the ground that he was a non-resident

and had not been served personally with process within the limits of the State." The plea was overruled, and at a later date the plea was renewed. "On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys * * * * and declined to further answer to the cause, relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the supreme court." In deciding this case the Court held as follows:

> "In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.
>
> "The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a state to 'deprive any person of life, liberty or property without due process of law.' And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is

only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto provided that substance of right is secured without unreasonable burden to parties and litigants. *Antoni v. Greenhow*, 107 U. S. 769. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment

> rendered without due service of process and therefore void, deprives him of liberty or property within the prohibition of the Fourteenth Amendment? We think not."

The Mississippi statute and decisions heretofore cited are similar to the rule in Texas; that is, in an attachment in Chancery if the defendant appears he submits himself to the jurisdiction of the Court, and this is the rule followed by the Supreme Court in this State when it held that: "The fact that the appellants are non-residents has no bearing on the question because they appeared and answered the bill."

Appellants, in the trial court, did not appear for the sole purpose of protecting their rights to the land on which the taxes had been paid, but, also to contest the validity of the assessment. They contended they did not owe any tax because the assessment had not been legally made.

Appellants rely upon the case of *Dewey vs. City of Des Moines*, 173 U. S. 193, 44 L. ed. 665.

There is nothing in said case that conflicts with the decision of the Supreme Court of Mississippi. That case was based upon Section 478, Code of Iowa, 1873. This Section, after providing how assessments for special improvements may be made, provides that the assessment is a lien upon the property and shall be payable by the owner. The Section then provides as follows:

> "Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation, or of any person to whom it shall have directed payment to

have been made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway. Proceedings may be instituted against all the owners or any of them, to enforce the lien against all the lots or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each."

This section does not provide that the owner of the property may contest the assessment. The Supreme Court of Mississippi holds that under Section 3122 the property owner may contest the assessment in the suit.

The Supreme Court, in the Dewey case held that making the personal liability apply to a non-resident deprived such non-resident of his property without due process of law. The Supreme Court of Mississippi holds that under the laws of Mississippi the property owner has due process of law, by reason of the fact that he may contest the assessment against his property.

The opinion in the Dewey case further holds that

"The jurisdiction of tax exists only in regard to persons and property, or upon the business done within the State and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident person liable to pay a tax of the nature of the one in question * * * The power to tax is, however, limited to persons, prop

erty and businesses within the State and it cannot reach the person of a non-resident."

This proceedings was brought against the property owned by appellants in Mississippi. In other words, it was a proceedings *in rem*. The State was not attempting to reach the person of the non-resident appellants. However, in order to release the property which the state held under a writ of attachment they executed a bond and submitted themselves personally to the jurisdiction of the court for the purpose of contesting the validity of the assessment of taxes on the land on which the taxes had not been paid.

In *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, the court held as follows:

"Thus it appears that on the return of the delinquent tax list the amount of the tax could be collected by distraint of goods and chattels, or by proceedings by attachment and publication, judgment in which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained, the defendant would not be cut off from any competent defense, as the delinquent list would not necessarily be held conclusive. In this case no defense on the merits appears to have been relied on except the want of situs. *Dewey vs. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, cited by

> plaintiff in error, is not to the contrary. What was rules there was that a citizen of one state cannot be cast in a personal judgment in another state on an assessment levied thereon on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

This opinion is clearly in accord with the opinion of the Supreme Court of Mississippi.

The Dewey case holds that you cannot take the property of a non-resident without due process of law; the Bristol case holds that it may be taken with due process of law. The Supreme Court of Mississippi holds that you may take property of a non-resident with due process of law and that the statute in question gives to the appellants due process of law.

POINT III.

THE DECREE AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI DO NOT DENY THE NON-RESIDENT APPELLANTS PRIVILIGES AND IMMUNITIES POSSESSED BY CITIZENS OF THE STATE IN VIOLATION OF SECTION 2, ARTICLE 4, AND ARTICLE 14 OF THE CONSTITUTION OF THE UNITED STATES.

This question was not raised by appellant in his assignments of error in the court below. (R. 51) It was not discussed by the court in its opinion. It was raised for the first time in the suggestion of error. (R. 73) The objection in the suggestion of error comes too late.

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, wherein the court held as follows:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this court."

The only thing in the record to sustain this contention is an agreement dictated into the record by Mr. Gore, attorney for appellants in the trial court. (R. 38)

> "It is hereby agreed by and between counsel for the complainants and counsel for the defendants that it is the general custom in the State of Mississippi to make sale of lands on which default in the payment of taxes has been made on the First Monday in April of the year succeeding the assessment of the taxes, and that on the first Monday of April 1929, all lands in default for the payment of taxes, except the lands belonging to these defendants were offered for sale and sold by the Tax Collector of Tunica County, Mississippi. It is further agreed that the lands of the defendants in default for the payment of taxes in April, 1929, were the only lands in Tunica County delinquent for taxes from which the merchantable timber had been removed between the date of the assessment and date set for the tax sale."

This agreed part of the record shows affirmatively that there were two classes of delinquent taxpayers in Tunica County. One class had not paid its taxes, but had preserved its property subject to the lien for taxes. The other class, composed of appellants, cut and removed the timber from their property, and this timber constituted the major part of the value of the property.

The right to bring the suit was based on this fact.

It is true, as agreed, that the general custom is for the state to collect its taxes by the sale of the property; however, as shown by the decisions of the Supreme Court in this state, under special circumstances or facts peculiar to isolated cases, the state has brought suit to collect the taxes. See the following cases.

Delta and Pine Land Co. v. Adams, 93 Miss. 340;

Enochs v. State, 128 Miss. 361;

Powell v. McKee, 81 Miss. 229.

It, therefore, appears that the facts in this case clearly distinguishes it from the other delinquent taxpayers in said County, and the state was therefore warranted in electing the remedy pursued.

POINT IV.

THE CONSTRUCTION OF WHAT IS NOW SECTION 3122, CODE OF 1930, WAS FOR THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND THIS

COURT IS BOUND THEREBY, UNLESS THE STATUTE, AS CONSTRUED, VIOLATES THE FEDERAL CONSTITUTION.

Appellants contend that Section 3122, Code of 1930 is a mere rule of evidence. The Supreme Court of the State, however, held that service of process in a suit or the personal appearance of the defendants in a suit brought under this section was due process of law. This court is bound by the construction placed on said statute by the Supreme Court of Mississippi. In other words, this court will read the statute the same as if the construction placed thereon by the Supreme Court was written in the statute.

In *Farncomb vs. Denver*, 252 U. S. 7, 64 L. ed. 424, it was held that the Federal Supreme Court, when dealing with constitutionality of said statutes, challenged under article 14 of the U. S. Supreme Court, accepts the meaning of such statutes as construed by the highest court of the State. See also *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971; *Corn Products Refining Company v. Eddy*, 249 U. S. 427, 63 L. ed. 689.

See also cases cited under Point 1 (c), page 17, of this brief.

POINT V.

THE QUESTION OF THE JURISDICTION OF THE CHANCERY COURT IS A QUESTION FOR THE STATE COURT TO DETERMINE AND THIS COURT IS BOUND THEREBY.

Appellant complained that the court below erred in

holding that the Chancery Court in Mississippi had jurisdiction to fix the amount of taxes due onthe lands in question.

This question was not raised in the trial court. (See answer to defendants. R. p. 8) It was not raised in assignment of error filed in the Supreme Court. (R. p. 57) It was not discussed by the court. (R. p. 53) It was raised for the first time in the suggestion of error, (R. p. 73) This comes too late.

American Surety Co. v. Baldwin, supra.

The constitution of the State of Mississippi fixes the jurisdiction of its chancery courts and also of its circuit courts. Section 147 of the Constitution, however, provides as follows:

> "No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction."

In construing this section, our Court held that the Supreme Court itself, will raise the question of limitation on its powers to reverse or annul a judgment for want of jurisdiction, as provided in said section.

Talbot Lumber Company vs. McLeod Lumber Co., 147 Miss. 186.

The court has further held that in the absence of any other error than want of jurisdiction as provided in said section, the court will affirm the judgment or decree.

Boyett v. Boyett, 152 Miss. 201;

Thompson v. Hill, 152 Miss. 388.

It is further held that the fact that a cause of action set forth in a bill is legal and not equitable presents no ground for reversing the decree.

Carter v. Witherspoon, 156 Miss. 597.

It is also well settled under the jurisprudence of Mississippi that when an equitable court has jurisdiction on one ground, it has jurisdiction to deteremine the whole case.

CONCLUSIONS.

1. We most respectfully submit that this court is without jurisdiction, because the Federal questions here complained of were not raised in the court below, because the opinion of the Supreme Court of Mississippi did not involve a Federal question and because the Federal questions, attempted to be raised here, have been foreclosed by previous decisions of this court.

2. That appellants were not deprived of their property without due process of law.

3. That appellants were not denied equal protection, privileges and immunities.

4. That the Supreme Court has construed Section 3122, Code of 1930 and this court is bound by the construction and that under said Section, as construed, appellants were not denied due process of law.

5. That the question of the jurisdiction of the Chancery Court is a question for the State court.

We, therefore, most respectfully submit that the decree of the Supreme Court of Mississippi in this case should be affirmed.

Respectfully submitted,

STATE OF MISSISSIPPI Appellee,

GREEK L. RICE, Attorney General.

By J. A. LAUDERDALE,
Assistant Attorney General.

SUPREME COURT OF THE UNITED STATES.

No. 298.—October Term, 1933.

S. M. Nickey, W. E. Nickey, Mrs. Orpha L. Nickey, et al., Appellants, *vs.* The State of Mississippi. } Appeal from the Supreme Court of the State of Mississippi.

[May 21, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, § 237 of the Judicial Code, from a decree of the Supreme Court of Mississippi allowing recovery of delinquent taxes assessed upon appellants' lands within the state and overruling their contention that the assessment of the tax and the decree for its payment infringe the due process clause of the Fourteenth Amendment. — Miss. —. So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules. *Wall* v. *Chesapeake & Ohio R. Co.*, 256 U. S. 125. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267. *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U. S. 23, 24. We confine our opinion to the questions thus discussed.

Appellants, non-residents of Mississippi, are owners of tracts of land in Tunica County, Mississippi, all of which were assessed for local and state taxation for the year 1928. They failed to pay the tax on one tract alone, and the state, on relation of the Attorney General, brought the present suit in the chancery court of Tunica County to recover the unpaid tax as a debt of the owners. This suit was begun by attachment of other lands of appellants' on which the tax had been paid. The bill of complaint alleges that the appellants are engaged in removing timber from the land on which the tax has not been paid; that the land without it is not of sufficient value to pay the tax, and that unless they are restrained from

cutting the timber the state and its municipal subdivisions will be deprived of the tax. The bill prays that appellants be enjoined from cutting the timber until the tax is paid, and that it be satisfied from the attached lands.

Appellants appeared generally in the suit, and secured the release of the attachment by giving bond, in the sum of $10,000, an amount in excess of all taxes claimed and recovered, by which they and their sureties became bound to satisfy any decree which might be recovered in the suit. In their answer they set up numerous defenses on state grounds, all of which so far as now material have been resolved against them and may not be reviewed here. They also set up two distinct defenses, which are urged here: First, that they are and at all times have been non-residents of the state and that the tax demanded was assessed without service of any process on them, or notice to them, or opportunity to be heard in any proceedings for its assessment, and without their appearance in any such proceedings; that in consequence the state taxing officers were without jurisdiction to assess the tax and that any collection is an infringement of the Fourteenth Amendment. Second, that the decree of the state court, so far as it purports to adjudicate any right of the state to satisfy the tax liability out of lands of appellants within the state other than those upon which the tax was assessed, or to impose upon appellants any personal liability for the tax, is likewise a violation of due process.

1. Section 3122 of the Mississippi Code of 1930 declares that every lawful tax is a debt for the recovery of which an action may be brought in the state courts "and in all actions for the recovery of ad valorem taxes the assessment rolls shall only be prima facie correct". In construing and applying this section in the present case, the state court held that the tax, recovery of which it allowed, was a debt collectible by suit. But as the statute makes the assessment roll only prima facie correct, the court, following its decision in *George County Bridge Co. v. Catlett*, 161 Miss. 120, ruled that it is open to a defendant, in such a suit, to assail the correctness and legal sufficiency of the assessment; that it is the proceeding in court and not the assessment which finally fixes the liability to pay the tax, and since appellants had appeared in the suit and had had full opportunity to be heard before the decree was rendered upholding the assessment, there was no denial of due process.

Accepting, as we must, this construction of the laws of the state by its highest court, they infringe no constitutional limitation. There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165; *Bristol* v. *Washington County*, 177 U. S. 133, 146; *McMillen* v. *Anderson*, 95 U. S. 37; see *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168.

2. The question remains whether the state, in conformity with due process, may declare the tax, lawfully assessed upon one tract of appellants' land, a debt collectible from other property of theirs within the state and from the appellants themselves by a judgment *in personam*. It can no longer be questioned that a state may collect taxes, assessed against one parcel of property within its jurisdiction, from other parcels within the state, owned by the same person, though he be a nonresident. *Scottish Union & National Insurance Co.* v. *Bowland*, 196 U. S. 611, 632; *Bristol* v. *Washington County*, *supra*, 145; compare *Mayre* v. *Baltimore & Ohio R. R. Co.*, 127 U. S. 117, 123-124; see *Iowa* v. *Slimmer*, 248 U. S. 115, 120. To that extent at least the power of the state over the property within its bounds may be exerted to affect the interest of the common owner. The power to collect the tax from property within the state is always exercised at the expense of the owner, even though a non-resident, and an obligation *in rem* is thus imposed on his ownership, which is within the control of the state because of the presence there of the physical objects which are the subject of ownership. As it is an incident of property that it may be made to respond to obligations to which its owner may be subject, no want of due process is involved in satisfying an obligation imposed upon the ownership of one item of property by resort to another which is subject to the same ownership.

Here the suit was brought to compel payment of the tax out of the attached property. The end sought was the same as that constitutionally achieved in *Scottish Union & National Ins. Co.* v. *Bowland*, *supra*, by distraint upon the non-resident's property to satisfy a tax assessed upon other property within the taxing state,

and is equally free from constitutional objection. By giving their bond to release the attachment, the appellants have voluntarily substituted their personal liability on the bond for the liability which might otherwise have been satisfied from the attached property. As the tax, payment of which is decreed, is less than the amount of the bond, it is only this personal liability upon the bond which the state seeks to enforce here.

It is unnecessary to decide the different question with respect to appellants' personal liability to pay the tax which would be presented if the decree had exceeded the amount of the bond, or if appellants had appeared and defended the suit without giving bond or securing release of the attachment. See *Dewey* v. *Des Moines*, 173 U. S. 193; *Scottish Union & National Insurance Co., supra*, 632. Compare *York* v. *Texas*, 137 U. S. 15.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.